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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN A. SHORTER, JR.

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the standards governing the admissibility of expert testimony based on novel scientific evidence enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) which require general acceptance of the technique in the appropriate scientific community have survived the enactment of the Federal Rules of Evidence?

2. Whether the "continuing offense" doctrine is applicable to the offense of income tax evasion (26 U.S.C. §7201) so as to permit the government to charge in a single count of an indictment the evasion of the payment of income taxes in twelve separate tax years?

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v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, John A. Shorter, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 16, 1987, affirming the petitioner's conviction for violations of 26 U.S.C. §7201 and §7203.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit affirming the petitioner's conviction was entered on January 16, 1987, and is reported at 809 F.2d 54 (D.C. Cir. 1987). The decision of the United States District Court for the District of Columbia prohibiting the petitioner

from introducing expert testimony in his defense was entered on September 13, 1985, and is reported at 618 F.Supp. 255 (D.D.C. 1985). The decision of the United States District Court for the District of Columbia denying the petitioner's Motion to Dismiss Count One was entered on March 26, 1985, and is reported at 608 F.Supp. 871 (D.D.C. 1985). These decisions appear in the Appendix to this Petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered and filed on January 16, 1987. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by petitioner on February 13, 1987, and said petition was denied by Order of the Court of Appeals entered and filed on March 5, 1987.

This Petition for Writ of Certiorari was served and filed within sixty (60) days of March 5, 1987. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS

Title 26, United States Code, Section 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years,

or both, together with the costs of prosecution.

Title 26, United States Code, Section 7203, provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

Rule 702, Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

The petitioner, John A. Shorter, Jr., was indicted for tax evasion in violation of 26 U.S.C. §7201 and for failure to pay federal income taxes in violation of 26 U.S.C. §7203. Count One of the indictment charged the defendant with evading the payment of federal income taxes over the course of twelve separate tax years, i.e. 1972 through 1983. Counts Two, Three, Four, Five, Six, and Seven alleged a willful failure to pay income taxes for the years 1978, 1979, 1980, 1981, 1982, and 1983, respectively.

The defendant moved to dismiss Count One on the grounds that it improperly charged twelve years of tax evasion in a single count. The defendant argued that since each tax year related to a separate offense, the charging of twelve tax years in one count was duplicitous and prejudicial. The district court denied this motion, relying on the doctrine of continuing offenses. *United States v. Shorter*, 608 F.Supp. 871 (D.D.C. 1985).

The defendant also filed a notice of defense based on mental condition pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure. The mental condition at issue was the impulse control disorder known as compulsive gambling.[1] The government moved to exclude this evidence. As a result, a two-day hearing was held at which several psychologists and psychi-

[1] Compulsive gambling, sometimes called pathological gambling, is recognized by the mental health community as an impulse control disorder. *See* American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, 3d Ed. 1980, (DSM-III), cited in United States v. Shorter, 618 F.Supp. 255, 258 (D.D.C. 1985).

atrists testified. In the district court, the defendant proffered the expert testimony of two clinical psychologists and a psychiatrist specializing in the diagnosis and treatment of the impulse control disorder of compulsive gambling.

The defense experts testified at the pre-trial hearing that a cash lifestyle, financial mismanagement and the relinquishment of control over financial affairs are common characteristics of compulsive gamblers related to their disorder. Dr. Ciarrocchi, a clinical psychologist and director of addiction services at Taylor Manor Hospital in Ellicott City, Maryland, diagnosed the defendant as a pathological gambler. He noted that a pathological gambler could not resist, without difficulty, gambling all the money he could get his hands on. He also noted that if a compulsive gambler has access to credit, this impulse will lead him to run his credit cards to the limit or write checks that he cannot cover. (H.Tr. 37.)[2] Therefore, financial mismanagement and the relinquishment of controls over financial matters are classic symptoms of a pathological gambler. (H.Tr. 86-87.) Dr. Moravec, a clinical psychologist specializing in the treatment of pathological gamblers, also concluded that the defendant was a pathological gambler. (H.Tr. 128.) He testified that it is common for pathological gamblers to lead cash lifestyles and to allow others to impose financial controls on them. (H.Tr. 135.) Dr. Resnick, a psychiatrist who also treats compulsive gamblers (H.Tr. 303), testified that many pathological gamblers lead cash lifestyles because of the temptations and diffi-

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[2] H.Tr. refers to the transcript of the pretrial hearing held on September 9, 10, and 11, 1985. All references to the trial testimony will be denoted by "Tr.".

culties caused by the availability of checks or credit cards. (H.Tr. 324.) Significantly, none of the government experts were questioned about these particular characteristics.

This testimony was offered for two purposes. First, the defendant maintained that the presence of this disorder generally rendered him incapable of forming the requisite criminal intent for the offenses with which he was charged. *See* Defendant's Response to Government's Motion to Exclude Evidence of Mental Condition, pp. 10-17 (hereinafter Defendant's Response); Defendant's Supplemental Response to Government's Motion to Exclude Evidence of Mental Condition, pp. 7-8,13 (hereinafter Defendant's Supplemental Response); *United States v. Shorter*, 618 F.Supp. 255, 258 (D.D.C. 1985). The district court rejected this defense by applying the *Frye* test and concluding that there was no general acceptance among the experts in the relevant scientific community that there is a link between pathological gambling and the failure to pay taxes. *Id.* at 260-61.

The defendant also proffered the expert testimony to show that his compulsive gambling

> has resulted in certain behavior, such as . . . the maintenance of a cash lifestyle.

(Defendant's Response, p. 17.)

This evidence was offered to rebut the government's allegation that the defendant's cash lifestyle and financial mismanagement constituted the affirmative acts necessary for the charge of tax evasion, *see Spies v. United States*, 317 U.S. 492 (1943), as well as circumstantial evidence of the element of willfulness necessary for conviction of the misdemeanor

counts of failure to pay. *See* Defendant's Response, pp. 17, 21; Defendant's Supplemental Response, p. 8; *United States v. Shorter*, 618 F.Supp. 255, 258 n.7, 261 n.14 (D.D.C. 1985); Government Evidentiary Proffer in Support of Defendant's Plea of Guilty, p. 4; Tr. 1462-66; 1543-46; 1552.

Much of the government's evidence of the defendant's cash lifestyle and financial mismanagement consisted of the testimony of his law partner, Bernadette Gartrell. Before this partnership was formed, the petitioner was a sole practitioner and Ms. Gartrell was an associate in his office. He conducted his practice in a small townhouse with several other lawyers with whom he jointly shared expenses (Tr. 835). Ms. Gartrell learned in the summer of 1974 that the other lawyers were leaving the office and she unilaterally decided to take over the operation and management of the petitioner's business affairs (Tr. 840-42). She engaged an accounting firm to set up a bookkeeping and accounting system and to service the books and prepare tax reports and returns (Tr. 856, 859). In July 1974, she opened a bank account in her name as the sole signatory and took control of all of the income, which she deposited in the bank account. (Tr. 845-46, 852).[3] From that point on, she handled all of the financial, administrative and personnel mat-

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[3] The reason she opened the account in her own name was because, "I didn't want him [the petitioner] to have anything to do with the bank account, because I wanted the money there so I could pay the expenses in the office" and that "I wasn't sure that the money would be there to pay the bills" (Tr. 990, 993). Later, in September 1974, she opened another account in her name only to have as an office "reserve account" (Tr. 849-50).

ters pertaining to the petitioner's practice which, in a matter of months, evolved into the partnership. She testified that she took control of the affairs of the office because, up to that time, the petitioner had no bank account and no books or records of account (Tr. 838-39). Instead, he kept notations of his income and expenses on "little pieces of paper" (Tr. 838-39). In her view, the petitioner was not a financially responsible person (Tr. 1020-1020A). Her control of all administrative and financial matters of the office was absolute (Tr. 1055-56). The petitioner never showed any concern or interest in any of these matters (Tr. 1059-60); nor did he offer any input in the decisions (Tr. 1052). She decided what the partners' compensation would be and when and if it should be paid (Tr. 1052, 1057). She attended to the preparation of all business reports, including the partnership tax return which was filed timely each year (Tr. 861-864). During the entire time of their professional relationship she never knew the petitioner to have a bank account or charge cards (Tr. 873-74).

Several times between April 1975 and late 1979, four Revenue officers and a Special Agent of the Internal Revenue Service (IRS) attempted to identify and locate assets of the petitioner to satisfy the several liens and judgments obtained by the government for income taxes owed by the petitioner.[4] In every instance, no assets of the petitioner could be found.[5]

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[4] Revenue Officers Vernon Rippeon, Vito Aquaviva, Dorothy Spivak, and George Howe, as well as Special Agent John R. Price, each testified that they made a search for assets belonging to the petitioner (Tr. 221-22, 223; 259; 326; 391)

[5] Tr. 222; 223; 259; 327; 391.

The petitioner had no automobile, bank account, real estate, or credit cards (Tr. 222, 703, 873).

The district court rejected the proffered expert testimony, concluding that the defendant had failed to present a "compelling indication" that expert testimony, instead of lay testimony, was required to rebut the government's theory about the criminal reasons for the cash lifestyle and financial mismanagement. The district court made no mention of the *Frye* standards in its decision with respect to this second basis for the proffer.

On appeal, the defendant abandoned the first prong of his proffer, i.e. that compulsive gambling negates willfulness, and relied on the claim that his cash lifestyle and financial mismanagement were symptoms of his compulsive gambling and not affirmative acts of evasion. Despite the fact that the district court did not utilize *Frye* in its rejection of this aspect of the proffer, the Court of Appeals relied on the "general acceptance" standard of *Frye* in rejecting the proffer. Specifically, the Court of Appeals held that although compulsive gambling has been generally accepted by mental health professionals as an impulse control disorder,

> there was little agreement among the experts that cash lifestyle, financial mismanagement, and relinquishment of financial control were indeed "characteristics" of compulsive gambling accepted by the relevant mental health community.

United States v. Shorter, 809 F.2d 54, 61 (D.C. Cir. 1987).

ARGUMENT

I. The standards for evaluating the admissibility of novel scientific evidence enunciated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) have not survived the enactment of the Federal Rules of Evidence.

Sixty-four years ago, the Court of Appeals for the District of Columbia Circuit set forth standards for evaluating the admissibility of novel scientific evidence. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). These criteria require that the scientific principle at issue be "generally accepted" by the appropriate scientific community and reflect "a conservative approach to the admissibility of scientific evidence." *United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985). Indeed the District of Columbia Circuit has itself recognized that "the *Frye* standard retards somewhat the admission of proof based on new methods of scientific investigation." *United States v. Addison*, 498 F.2d 741, 743 (D.C. Cir. 1974).

Since that formulation of the *Frye* test, there has been a major reform in the law of evidence, culminating in the adoption of the Federal Rules of Evidence. These rules were adopted to satisfy the

> real need for a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of uniformity and clarity in the present law of evidence on the Federal level.

S.REP. No. 1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7054. *See* H.R.REP. No. 650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7051, 7075.

The Federal Rules of Evidence specifically address the admissibility of expert testimony in Rule 702 and provide for the admission of expert testimony when it will assist the trier of fact. The Rule itself does not incorporate the standards expounded by the Court in *Frye* and the legislative history makes no mention of the *Frye* decision. Rather, Rule 702 has been held to provide a liberal standard favoring the admissibility of expert testimony. *United States v. Downing*, 753 F.2d 1224, 1229 (3d Cir. 1985); *In Re Japanese Electronic Products*, 723 F.2d 238, 279 (3d Cir. 1983), *reversed on other grounds*, 54 U.S.L.W. 4319 (1986); *In Re Agent Orange Product Liability Litigation*, 611 F.Supp. 1223, 1242 (E.D.N.Y. 1985). *See* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶703[03], at 702-14-15.

There is an inherent conflict between the strict approach of *Frye* and the broader bent of the Federal Rules of Evidence. It is not surprising, therefore, that a conflict has developed among the Circuit Courts of Appeal over the appropriate standards to be used in assessing the admissibility of expert testimony involving "novel scientific principles." *Compare Barrel of Fun, Inc. v. State Farm Fire and Casualty Insurance Co.*, 739 F.2d 1028, 1031 n.9 (5th Cir. 1984); *United States v. Tranowski*, 659 F.2d 750, 754-57 (7th Cir. 1981); *United States v. Brown*, 557 F.2d 541, 556-57 (6th Cir. 1977); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974) *with United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978); *United States v. Baller*, 519 F.2d 463 (4th Cir. 1975); *see United States v. Hope*, 714 F.2d 1084, 1087 n.3 (11th Cir. 1983). Ironically, the Federal Rules of Evidence were

designed to prevent such differences. Therefore, it is imperative that this Court resolve this conflict. Indeed, the conflict over the continued vitality of the *Frye* standards in the face of the adoption of the Federal Rules of Evidence compelled Justice White and Justice Brennan to dissent from the denial of certiorari in *Mustafa v. United States*, ___ U.S. ___, 55 U.S.L.W. 3334 (U.S. Nov. 10, 1986) (White, J. and Brennan, J., dissenting) ("I would grant certiorari to resolve this conflict on an obviously recurring and important issue.").

This case offers this Court the opportunity to establish a uniform approach to the admissibility of expert testimony. The Court of Appeals' utilization of *Frye* to assess the admissibility of the defendant's proffered expert testimony brings it into conflict with the standards employed in evaluating such testimony by the Courts of Appeals in the Second, Third, and Fourth Circuits. *See United States v Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978); *United States v. Baller*, 519 F.2d 463 (4th Cir. 1975). Indeed, the exclusion of the proffered testimony conflicts with this Court's pronouncement on psychiatric testimony in *Barefoot v. Estelle*, 463 U.S. 880, 898-99 (1983):

> [T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as

> generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.

The question of the admissibility of this evidence under Rule 702 of the Federal Rules of Evidence is easily answered. If the testimony will assist the jury to understand the evidence or to determine a fact in issue, the testimony may be admitted. *United States v. Rivera Rodriguez*, 808 F.2d 886, 888 (1st Cir. 1986) ("There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute"). The government presented a great deal of evidence about the defendant's cash lifestyle, the complete mismanagement of his financial affairs, and the manner in which he abdicated control over his finances to his law partner. These allegations were central to the government's theory of tax evasion. They constituted the affirmative acts necessary to elevate the mere failure to pay taxes into a case involving tax *evasion*.

The proffered testimony would have offered the jury another explanation for the defendant's behavior, i.e. that this conduct was a product of his compulsion and not of any criminal intent.[6] Such evidence is routinely

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[6] Contrary to the assertion of the Court of Appeals that this

admitted under Rule 702 when offered by the government. *See United States v. Ferri*, 778 F.2d 985, 988-90 (3d Cir. 1985) (expert testimony of physical anthropologist that shoes found at crime scene belonged to defendants based on impressions found inside shoes properly admitted under Rule 702); *United States v. Stewart*, 770 F.2d 825, 831 (9th Cir. 1985) (DEA agents properly permitted to testify that defendant's driving behavior was attempt to avoid surveillance and indicative of delivery of drugs); *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984) (government expert on fraudulent schemes may testify as to general practices of criminals to establish defendant's *modus operandi*); *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984) (expert

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use of the expert testimony was not proffered below, *see* United States v. Shorter, 809 F.2d 54, 61, the record contains several references to this theory of the proof. *See* pp. 6-7, infra. The district court recognized this basis for the proffer when it observed that

> Defendant contends that the experts familiarity with the personal habits of compulsive gamblers would help the trier of fact to assess the government's argument that defendant's lifestyle is evidence of an intent to willfully evade and willfully fail to pay taxes.

United States v. Shorter, 618 F.Supp. 255, 261 n.14 (D.D.C. 1985).

The district court found that the petitioner failed to offer a "compelling indication" that expert testimony as opposed to lay testimony was required on this subject. This holding placed an inappropriate burden on the defendant to justify his proffer. Rule 702 says nothing about the necessity of a proponent of evidence establishing a compelling need for the evidence. The petitioner considers the propriety of the district court and the court of appeals imposing this burden on him to be a subsidiary issue encompassed by this petition.

psychiatric testimony by government witness that victim suffered from posttraumatic stress disorder properly admitted to explain conduct of victim); *United States v. Burchfield*, 719 F.2d 356, 358 (11th Cir. 1983) (expert testimony by government witness about the *modus operandi* of counterfeiters "helped to explain the actions of the defendants."); *United States v. Pugliese*, 712 F.2d 1574, 1581 (2d Cir. 1983) (expert testimony by government agent regarding characteristics of heroin addicts "could 'assist the trier of fact.' "); *United States v. Carson*, 702 F.2d 351, 369 (2d Cir. 1983) (expert testimony of agents about clandestine manner in which drugs are bought and sold properly admitted under Rule 702); *United States v. Scavo*, 593 F.2d 837, 843-44 (8th Cir. 1979) (government's expert testimony about the typical structure and jargon of gambling enterprises properly admitted).

Similarly, the rejection of expert psychiatric testimony proffered by the defense under similar circumstances has been found to be reversible error. *See United States v. McBride*, 786 F.2d 45, 50 (2d Cir. 1986) (reversible error to exclude expert testimony as to psychological implications of defendant's objectively ascertainable brain injury offered to explain defendant's state of mind); *United States v. Roark*, 753 F.2d 991, 994 (11th Cir. 1985) (reversible error to exclude proffered testimony of defense psychiatrist that defendant was extremely susceptible to suggestions, thus explaining that she may have been psychologically coerced into confession); *United States v. Hill*, 655 F.2d 512, 516 (3d Cir. 1981) (where the defendant raised the defense of entrapment to a charge of distribution of narcotics, expert psycholog-

ical testimony offered on the issue of defendant's susceptibility to influence to show that he was not predisposed to commit the offense should have been permitted).

The analysis in these cases applies to defendant Shorter's proffer of expert testimony. A jury, unversed in the psychology of compulsive gambling, would be unable to fully understand why a compulsive gambler would maintain a cash lifestyle or fail to keep financial records. Lay testimony alone would not serve to educate the jury in this regard because it is highly unlikely that even those persons who had the closest contact with defendant would be able to analyze his behavior from the standpoint of a psychologist or psychiatrist who regularly treats compulsive gamblers. This information would have established a direct correlation between compulsive gambling and a cash lifestyle and financial mismanagement, making it more likely that these acts were motivated by a compulsive disorder rather than a desire to evade taxes.

These cases properly analyze the issue within the framework of Rule 702 of the Federal Rules of Evidence without imposing the additional element that the principles underlying the testimony be "generally accepted" by the scientific community.[7]

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[7] Indeed, even if *Frye* survived the enactment of the Federal Rules of Evidence, it has no application to the proffered testimony since this testimony related solely to the characteristics of compulsive gamblers and not to novel scientific evidence such as polygraph tests. *See* Bundy v. State, 455 So.2d 330, 349 (Fla. 1984) (*Frye* analysis does not apply to bite mark evidence which differs from breathalyzer tests, radar, and polygraph tests as those techniques involve total reliance on scientific interpretation

The Third Circuit, in rejecting the *Frye* test for determining the admissibility of scientific evidence, has noted that it suffers from serious flaws.

> First, the vague terms included in the standard have allowed courts to manipulate the parameters of the relevant "scientific community" and the level of agreement needed for "general acceptance." . . . [O]ther problems that arise in applying the *Frye* test [are]: the selectivity among courts in determining whether evidence derives from "novel" principles; the inadequacy of expert testimony on many scientific issues; and uncritical acceptance of prior *judicial*, rather than scientific, opinion as a basis for finding "general acceptance"; and the narrow scope of review by which some appellate courts review trial court rulings. . .
>
> Apart from these various difficulties in implementation, moreover, *Frye's* general acceptance standard has been found to be unsatisfactory in other respects. Under *Frye*, some have argued, courts may be required

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to establish question of fact).

One of the problems presented by *Frye* is determining what types of evidence should be classified as novel scientific evidence. *See* United States v. Downing, 753 F.2d 1224, 1233 n.11 (3d Cir. 1985); Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 Columbia L.Rev. 1197, 1219-21 (1980); 22 Wright & Graham, Federal Practice and Procedure, §5168, p. 87.

The issue of whether *Frye* even applies to the type of evidence proffered by the defendant is a subsidiary issue encompassed by this petition.

> to exclude much probative and reliable information from the jury's considerations, thereby unnecessarily impeding the truth-seeking function of litigation. . .
>
> [I]n its pristine form the general acceptance standard reflects a conservative approach to the admissibility of scientific evidence that is at odds with the spirit, if not the precise language, of the Federal Rules of Evidence.

United States v. Downing, 753 F.2d 1224, 1236-37 (3d Cir. 1985). *See United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) ("Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation").

When Rule 702 of the Federal Rules of Evidence is balanced by Rules 401 and 403, an appropriate framework is provided for analyzing the issues involved in evaluating the admissibility of expert testimony. The *Frye* standards, adopted in an age when scientific techniques were less advanced, are outmoded and in conflict with the philosophy underlying the Rules of Evidence. This conflict undermines the uniformity that the Rules were designed to foster. In the words of Justice White's dissent from the denial of certiorari in *Mustafa v. United States*, *supra*, it is time for this Court "to resolve this conflict on an obviously recurring and important issue."

II. The evasion of the payment of taxes, defined by U.S.C. § 7201, is not a continuing offense which would permit the government to charge the evasion of the payment of taxes for twelve separate tax years in a single count of an indictment.

A. Introduction

Count One of the indictment in the instant case was drawn under 26 U.S.C. §7201. It charged as follows:

> From on or about April 15, 1973, and continuing thereafter up to and including the date of the return of the indictment, within the District of Columbia, the defendant, John A. Shorter, Jr., knowingly and willfully attempted to evade and defeat the payment of a large part of the income taxes due and owing by John A. Shorter, Jr., to the United States of America for the calendar year 1972 through and including 1983. . .
>
> Among the means and methods by which the said defendant. . .did knowingly and willfully attempt to defeat the payment of income taxes. . .were failing and refusing to pay said taxes, concealing and attempting to conceal from the Internal Revenue Service the existence and amount of his available monies and the location thereof, making false statements to agents of the Internal Revenue Service, and placing his funds beyond the service process.

In the district court, the petitioner moved to dismiss Count One on the grounds that it charged twelve separate offenses, the evasion of the payment of taxes

for twelve separate tax years, as a single offense.[8] The court denied the motion concluding "that tax evasion covering several years may be charged in a single count as a course of conduct in circumstances such as these where the underlying basis of the indictment is an alleged consistent, long-term pattern of conduct directed at the evasion of taxes for these years." *United States v. Shorter*, 608 F.Supp. 871, 879 (D.D.C. 1985) (footnote omitted). On review, the circuit court reached the same conclusion and affirmed the district court's ruling. *United States v. Shorter*, 809 F.2d 54, 55-58 (D.C. Cir. 1987).

In reaching this conclusion, the lower courts misapprehended the offense defined by §7201 and incorrectly resolved the task of statutory construction. The question of whether the willful evasion of the payment of income taxes is a continuous offense, thereby permitting the charge in a single count of the evasion of the payment of taxes due for twelve years, is one that should be decided by this Court, because of: (1) its importance to the administration of federal criminal tax law; (2) the tension between the continuous offense doctrine and the purposes of the statute of limitations; (3) the evidentiary problems created; and (4) the need to have such a far-reaching principle enunciated, if at all, by this Court.

B. Properly Construed, § 7201 Does Not Define A Continuous Offense

An inquiry into the claim of duplicity must begin with an analysis of the statute defining the offense

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[8] "Duplicity is the joining in a single count of two or more distinct and separate offenses." J.C. Wright, *Federal Practice and Procedure*: Criminal § 142 (2d Ed. 1982) (footnote omitted).

charged. *United States v. Disantillo*, 615 F.2d 128 (3d Cir. 1980); *United States v. Zeilman*, 540 F.2d 314, 317 (7th Cir. 1976); *United States v. Kenney*, 444 F.Supp. 1290, 1293 (S.D.N.Y. 1976). The answer must be found from the section itself and its context in the revenue laws. *Cf. Spies v. United States*, 317 U.S. 492, 495 (1943). This Court has made it clear that "the doctrine of continuing offense should be applied in only limited circumstances. . .[A] particular offense should [not] be construed as a continuing one. . . unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970).[9] "A continuing offense is one which by its nature or by its terms is a single, ongoing crime." *United States v. Castellano*, 610 F.Supp. 1359, 1408 (S.D.N.Y. 1985).

The language of the statute is silent and unelucidating on the question whether it contemplates that a series of violations or a course of conduct may properly form a single continuous scheme and therefore be charged in a single count. Section 7201 of the Internal Revenue Code (Title 26 U.S.C.) provides that, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall. . .be guilty of a felony." This section defines two distinct crimes: (1) the willful attempt "to evade or defeat any tax," and (2) the

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[9] "The question into which category a given offense falls has long been held to be entirely a matter of statutory construction [authorities omitted]," White, J. dissenting, Toussie v. United States, *supra*, 397 U.S. 125.

willful attempt to evade or defeat the "payment" of any tax. *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984), *United States v. Mollet*, 290 F.2d 273, 274 (2d Cir. 1961). The elements of both 7201 violations are (1) willfulness, (2) existence of a tax deficiency, and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965). Count One of the indictment in this case charged the petitioner with the second crime under §7201, i.e., the willful attempt to evade or defeat the "payment" of his income taxes. There is nothing about the language of the statute that indicates that a continuing offense is contemplated.

The failure of Congress to word §7201 conclusively one way or the other on this point strongly supports the position that no continuous offense was contemplated. As this Court said in *Toussie*:

> since we are reluctant to imply a continuing offense except in limited circumstances, we conclude that any argument based on congressional silence is stronger in favor of not construing this Act as incorporating a continuing-offense theory.

397 U.S. at 120.

Under the Revenue Laws of the United States, the duty of individuals to report taxable income and to pay income taxes is on a calendar year basis. Section 7201 on its face does not suggest a Congressional purpose to create a continuous offense rather than a single one. Each of the two offenses under the statute is directed to the solitary purpose to either prohibit the evasion of any tax or the evasion of the payment

of any tax. It is the proscribed result itself, not the various means of accomplishing the result, to which the statute is directed. The phrase, "any tax", is key to the definition of whether either of the offenses under § 7201 is a continuing one. The evasion of the payment of "any tax" relates to the taxes due for a specific period or periods.

An indictment is duplicitous when the alleged evasion of the payment of the taxes for 12 years are joined together and each is treated as a part of a transaction constituting a single continuous offense. The two courts below determined that since "the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes" for the charged years, the count was not duplicitous.[10] This analysis begs the question, for if the statute does not contemplate a continuing offense, the defendant's conduct cannot create one. Only if the statute permits it does the behavior became material.

C. The Case Law Does Not Support the Conclusion that §7201 Defines a Continuing Offense

The question of whether it is proper to charge in a single count the attempted evasion of the payment of income taxes for more than one tax year is a remarkably unique one.[11] Nevertheless, in a variety

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[10] United States v. Shorter, *supra*, 809 F.2d at p. 58.

[11] The solitary federal case that has directly ruled that the offense of willful evasion of the payment of income taxes for more than one year can be charged in a single count is United States v. England, 229 F.Supp. 493, 500-501 (E.D. Ill. 1964). The case is factually distinguishable from the instant one. The defendants in *England* were charged in one count with the ev-

of contexts the courts have uniformly construed the statute as defining a separate offense for each tax year. *See United States v. Garcia*, 412 F.2d 999, 1001 (10th Cir. 1969) ("Each attempt to evade or defeat payment of the tax is a felony. Each year the attempt and underpayment is consummated as a separate crime."); *United States v. Smith*, 335 F.2d 898, 901 (7th Cir. 1964) ("We agree that the three counts might be said to pertain to a 'continuing course of illegal conduct' in the sense that the intention was to avoid taxes so long as payoffs continued, *but in a criminal tax evasion case each year stands alone*, and the failure to pay taxes in each of the years involved constitutes a separate offense."); *United States v. Janko*, 281 F.2d 156, 170 (8th Cir. 1960), *reversed on confession of error by Solicitor General*, 366 U.S. 716 (1961), ("The first contention embraces the assertion that the evidence, at most, shows only a single course of conduct which is subject to a single punishment and cannot justify consecutive sentences. This is fully answered by reference to the well settled principle that each count charges a separate crime and that a like offense committed for each taxable year constitutes a separate and distinct crime."); *Norwitt v.*

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asion of the payment of taxes for multiple years (1944-1946) by the commission of affirmative acts in later years (from 1955 to the return of the indictment). In the instant case the petitioner was charged in one count with the evasion of the payment of taxes for a period of years of the taxes owed over the same period. In other words, the acts of evasion were charged to have begun twelve years ago and continued uninterrupted for each tax year thereafter amounting to one offense. Moreover, the holding in *England* is of dubious precedential value, since the court of appeals reversed the conviction on other grounds, finding it "unnecessary to discuss other specifications of error". United States v. England, 347 F.2d 428, 436 (7th Cir. 1965).

United States, 195 F.2d 127, 133 (9th Cir. 1952) ("The appellant correctly states that 'an attempt to evade a tax and the payment thereof is not a continuing offense.' "); *United States v. Sullivan*, 98 F.2d 79, 80 (7th Cir. 1938) ("Although the attempt to evade the tax for a given year is a separate offense from an attempt to evade the tax for a different year; they are clearly crimes 'of the same call.' "); *United States v. Goldberg*, 206 F.Supp. 394, 397 (E.D. Pa. 1962) *affirmed*, 330 F.2d 30 (3d Cir. 1962) ("A willful attempt to evade the tax for one year is a separate offense from a like attempt to evade for another year"); *United States v. Pack*, 140 F.Supp. 121, 125 (Del. 1956), *appeal dismissed*, 247 F.2d 168 (3d Cir. 1951) ("It is well established that income tax liability for each year constitutes a separate transaction and an attempt to evade income taxes is a separate offense for each year."); *United States v. Stoehr*, 100 F.Supp. 143, 159 (M.D. Pa. 1951), *affirmed*, 196 F.2d 276 (3d Cir. 1952) ("an attempt to evade income taxes is a separate offense for each year"). *See also Petition of United States*, 306 F.2d 737, 739 (9th Cir. 1962); *United States v. Lennon*, 246 F.2d 24, 27 (2d Cir. 1957); *Kobey v. United States*, 208 F.2d 583, 594-95 (9th Cir. 1953); and *Johnson v. United States*, 123 F.2d 111, 119 (7th Cir. 1941), *reversed on other grounds*, 319 U.S. 303 (1942).

The weight of judicial construction thus mandates that an attempt to evade income taxes is a separate offense for each tax year and that principles of duplicity bar charging a number of tax years in one count. The decision of the Circuit Court in this case conflicts with the expressions of other circuits on the

question of whether tax evasion is a continuing offense.

D. The Prejudicial Impact of the Duplicitous Count Mandates the Reversal of the Defendant's Conviction.

There are strong policy considerations underlying the prohibition against duplicitous counts.[12] These considerations reflect concerns about the fundamental due process rights of defendants and inhibit the otherwise broad prosecutorial discretion in the drafting of indictments. *United States v. UCO Oil Co.*, 546 F.2d 933, 934 (9th Cir. 1976). The assertion that the defendant's alleged criminal behavior is long-standing and repetitive lends color to the concept of continuing offense. But, as has been noted above, this perception confuses the nature of the defendant's conduct with the nature of the proscribed conduct.

One of the dangers posed by a duplicitous indictment—prejudice to the defendant by evidentiary rulings during the trial—arises from this unwarranted focus on the defendant's conduct. In the petitioner's case the trial court's ruling that the defendant's tax history from the years 1972 to 1983 constituted an unbroken pattern of criminal behavior permitted the prosecution freedom to introduce a wealth of evidence, including proof of the failure to file quarterly returns, to pay employees' withholding taxes, to pay

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[12] United States v. Kimberlin, 781 F.2d 1247, 1250 (7th Cir. 1985); United States v. Robin, 693 F.2d 376, 378 (5th Cir. 1982); United States v. Benardi, 675 F.2d 894, 899 (7th Cir. 1982); United States v. Alsobrook, 620 F.2d 139, 142 (6th Cir. 1980); United States v. Dorfman, 532 F.Supp. 1118, 1128 (N.D. Ill. 1981).

income taxes, and the making of false statements to agents of the IRS, all occurring during 1972 to 1977, outside the limitations period. Had the indictment charged each year in a separate count, the evidence perforce would have been compartmentalized as to each offense, and though evidence of other wrongdoing in the years 1972-1977 may have been admissible under F.R. Ev. 404(b),[13] it would have been scrutinized and weighed under the probative value/unfair prejudice test of F. R. Ev. 403,[14] and moreover subject to a caution to the jury as to its proper use.[15] These judicial safeguards would have fostered greater protection of the petitioner's due process and fair trial rights than the unfettered, wholesale admission of the evidence concerning the ancient and time-barred years. The failure of the lower courts to require the government to properly charge and prove its case prejudiced the defendant and mandates the reversal of his conviction.

CONCLUSION

For all of the reasons stated above, the petitioner respectfully submits that this Court should grant his petition for writ of certiorari to ensure the review of the important issues raised herein.

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[13] United States v. Dixon, 698 F.2d 445, 447 (11th Cir. 1983)(citing cases).

[14] United States v. Brinkley, 591 F.2d 903 (D.C. Cir. 1978); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)(en banc).

[15] United States v. Ferris, 517 F.2d 226 (7th Cir. 1975); United States v. Dixon, *supra*, 698 F.2d at 447.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
v.
JOHN A. SHORTER, JR.,
Appellant.

No. 85-6211.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 10, 1986.
Decided Jan. 16, 1987.

Defendant was indicted for one felony count of tax evasion and six misdemeanor counts of willful failure to pay federal income taxes. The United States District Court for the District of Columbia, Harold H. Greene, J., 608 F.Supp. 871, denied defendant's motion to dismiss felony count. The District Court, 618 F.Supp. 255, granted Government's motion to preclude defendant from introducing expert testimony on alleged compulsive gambling disorder. Defendant was convicted in the United States District Court for the District of Columbia of all counts, and he appealed. The Court of Appeals, McGowan, Senior Circuit Judge, held that: (1) tax evasion covering several years could be charged in single court as course of conduct where underlying basis of indictment was allegedly consistent, long-term pattern of conduct directed at evasion of taxes for those years, and (2) exclusion of proffered expert testimony was not abuse of discretion.

Affirmed.

Appeal from the United States District Court for the District of Columbia (Criminal No. 84-00421-01).

Plato Cacheris, Appointed by this Court, with whom Larry S. Gondelman, Appointed by this Court, was on the brief for appellant.

Laura Ross Blumenfeld, Asst. U.S. Atty., with whom Joseph E. diGenova, U.S. Atty., Michael W. Farrell, Thomas J. Tourish, Jr., and Darryl W. Jackson, Asst. U.S. Attys., were on the brief for appellees.

Before EDWARDS and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge McGOWAN.

McGOWAN, Senior Court Judge:

Appellant stands indicted for one felony count of tax evasion and six misdemeanor counts of willful failure to pay federal income taxes. Appellant moved to dismiss count one of the indictment, claiming that the government had impermissibly attempted to avoid the statute of limitations by incorporating twelve separate offenses in one count, resulting in a duplicitous count. The District Court denied appellant's motion. Appellant also filed a notice of intention to place in issue his mental condition by presenting expert testimony that he suffers from a pathological or compulsive gambling disorder. The District Court ordered that the expert testimony proffered by the defense for this purpose not be admitted at trial. The trial court sentenced appellant to forty months incarceration on count one, pursuant to 18 U.S.C. § 4205(b)(2); six months each on counts two through seven to run concurrently with each other and with count one; and a $10,000 fine. From this judgment, appellant contests the orders of the District Court. For the reasons set forth hereinafter, we affirm.

I.

By indictment filed on November 1, 1984, appellant was charged with one felony count of willful attempt to evade

the payment of income taxes due for the years 1972 through 1983, in violation of 26 U.S.C. § 7201, and with six misdemeanor counts of willful failure to pay income tax for each of the years 1978 through 1983, in violation of 26 U.S.C. § 7203. Appellant moved to dismiss count one of the indictment, claiming that he was being charged with acts barred by the statute of limitations, and that this count was impermissibly duplicitous because it incorporated twelve separate offenses. The District Court denied appellant's motion. *United States v. Shorter,* 608 F.Supp. 871 (D.D.C.1985). To ensure also that any guilty verdict would be unanimous, with respect to at least one affirmative act of evasion and one tax year delinquency, the District Court gave the jury a special unanimity instruction and required the jury to answer special interrogatories. *Shorter,* 608 F.Supp. at 881.

Appellant again contends that count one of the indictment—which charges the defendant with twelve separate offenses of tax evasion—was impermissibly duplicitous. Br. of Appellant at 20. " 'Duplicity' is the joining in a single count of two or more distinct and separate offenses." 1 C. Wright, *Federal Practice and Procedure: Criminal* § 142 (2d ed. 1982) (footnote omitted). The District Court set out in careful detail its analysis of this contention, noting consideration of two questions: (1) whether appellant's alleged actions may legitimately be regarded as a single course of conduct and hence as a single offense, and (2) whether appellant would be prejudiced by his prosecution on a single-count basis. *Shorter,* 608 F.Supp. at 875.

Appellant contends that because the offense of tax evasion is time-specific, that is, each offense is tied to a particular year, the charging of tax evasion in a single count with respect to more than one year is impermissibly duplicitous. Br. of Appellant at 20–22. However, as the District Court correctly concluded, ". . . it is well established that two or more acts, each of which would con-

stitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme." *Shorter,* 608 F.Supp. at 876 (citations omitted); *see also United States v. Mangieri,* 694 F.2d 1270, 1281–82 (D.C.Cir. 1982).

The few courts that have discussed the issue of duplicity in the context of income tax decisions have supported the conclusion that is permissible to charge conspiracy to evade several years' taxes as one count. *See, e.g., United States v. Baker,* 262 F.Supp. 657, 684 (D.D.C. 1966); *Lott v. United States,* 309 F.2d 115, 120–21 (5th Cir. 1962), *cert. denied* 371 U.S. 950, 183 S.Ct. 504, 9 L.Ed.2d 498 (1963); *United States v. Haskell,* 327 F.2d 281, 284 (2d Cir. 1964), *cert. denied,* 377 U.S. 945, 84 S.Ct. 1351, 12 L.Ed.2d 307 (1964). We agree with the District Court's conclusion that tax evasion covering several years may be charged in a single count as a course of conduct in circumstances such as those here where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years. *Shorter,* 608 F.Supp. at 879; *see also United States v. Boyle,* 338 F.Supp. 1028, 1035–36 (D.D.C. 1972); *United States v. Mangieri,* 694 F.2d at 1281–82.

The District Court considered two factors as crucial to the determination of whether a particular conduct may be charged as a continuous offense in a single count: (1) the language and legislative history of the statute, and (2) the nature of the proscribed conduct. *Shorter,* 608 F.Supp. 877; *see also United States v. Morse,* 785 F.2d 771 (9th Cir. 1986), *cert. denied,* ___ U.S. ___, 106 S.Ct. 2925, 91 L.Ed.2d 553 (1986); *United States v. UCO Oil Co.,* 546 F.2d 833, 835–37 (9th Cir. 1976), *cert. denied,* 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977).

In analyzing the first factor, the District Court concluded that the language and legislative history of the statute does not address directly the question of whether it is proper to charge a continuing scheme to evade taxes for several years. *Shorter,* 608 F.Supp. at 877. The statute makes it a felony for any person to "willfully attempt[] in any manner to evade or defeat any tax imposed by this title or the payment thereof. . . ." 26 U.S.C. § 7201. The Supreme Court, however, has construed this language broadly, contemplating acts that would be committed on a multi-year, continuing course of conduct:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner." By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal. *Spies v. United States,* 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943).

Although the language in *Spies* is not conclusive upon the question under consideration here, the District Court's findings are consistent with this language. Under this broad standard, we conclude that count one of the indictment may fairly be read to charge but a single scheme and is therefore not duplicitous.

The second factor, the nature of the proscribed conduct, also supports our ultimate conclusion. We find no basis

for appellant's argument that the District Court confused the nature of the proscribed conduct with the nature of the appellant's conduct. Reply Br. of Appellant at 8. The District Court stated in detail the government's charges. *See Shorter,* 608 F.Supp. 877-879. Briefly restated, since at least 1973, appellant has conducted all of his professional and personal business in cash, maintaining no bank accounts, office ledgers, or receipts or disbursement journals. Appellant received compensation in cash, paid his employees in cash, possessed no credit cards, and never acquired attachable assets. In short, appellant maintained what has come to be characterized as a "cash lifestyle." Br. of Government at 36.

Although appellant reported a total income for the twelve years from 1972 through 1983 of $387,438.96 on which there was a tax due, excluding interest and penalties of $134,866.40, appellant made only two $2,500 tax payments during that period. During the same period, the Internal Revenue Service ("IRS") obtained at least nine civil tax judgments against appellant, but because of the cash method of operation, the IRS was never able to collect on any of these judgments.

The District Court concluded, and we agree, that these activities could be regarded as evidencing a continuous course of conduct. In short, as the government argues, each affirmative act of tax evasion was intended to evade payment of all taxes owed, or which appellant expected to owe, at the time of the affirmative act. Br. of Government at 36. Indeed, the same evidence that the government would produce with respect to the single-count indictment covering twelve years "would be admissible to support the first count (in a twelve-count indictment) charging the evasion of taxes due in 1972, and this same evidentiary pattern could and would be repeated eleven more times, that is, with respect to each subsequent count." *Shorter,* 608 F.Supp. at 879.

Finally, appellant argues that language in a number of cases from other Circuits sheds light on the question of whether it is proper to charge a continuing scheme to evade taxes for several years. Br. of Appellant at 22–23 (*citing Costello v. Immigration and Nationalization Service,* 311 F.2d 343 (2d Cir. 1962), *rev'd on other grounds,* 376 U.S. 120, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964); *Chanan Din Khan v. Barber,* 147 F.Supp. 771 (N.D.Ca. 1957), *aff'd,* 253 F.2d 547, 9th Cir. 1958) *cert. denied,* 357 U.S. 920, 78 S.Ct. 1361, 2 L.Ed.2d 1364 (1958)). Again, we agree with the findings of the District Court that none of the cases cited by appellant are conclusive or even persuasive. Two of the decisions cited do not help appellant because the courts were construing immigration laws and not tax laws, and because of the different rationale on which the cases were decided. *See Shorter,* 608 F.Supp. at 875 n. 6; Br. of Appellant at 20.

Appellant's reliance upon several other cases is similarly mistaken. *United States v. Smith,* 335 F.2d 898, 901 (7th Cir. 1964), *cert. denied,* 379 U.S. 989, 85 S.Ct. 700, 13 L.Ed.2d 609 (1965), *Norwitt v. United States,* 195 F.2d 127 (9th Cir. 1952), *cert. denied,* 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed.2d 635 (1952), and *United States v. Johnson,* 123 F.2d 111 (7th Cir. 1941), *rev'd,* 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943) upheld decisions to charge evasion in as many counts as there were years. These cases do not stand for the proposition that "an indictment which charges tax evasion for more than one year is impermissibly duplicitous," *Shorter,* 608 F.Supp. at 876.

For these reasons, we affirm the District Court's finding that tax evasion covering several years may be charged in a single count as a course of conduct in circumstances such as these where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years.[1]

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[1] The District Court correctly noted also that in determining whether

II.

Appellant contends next that the statements he made to the IRS agents denying that he had any bank accounts were technically true, and therefore could not be relied upon by the jury as an affirmative act of tax evasion. Br. of Appellant at 28–29. Appellant argues that the evidence on these statements is insufficient to support a conviction. *Id.* We find no merit to this argument as the evidence was clearly sufficient to support a jury's finding that these and other statements to the agents constituted an affirmative act of evasion. *See, e.g., Spies v. United States,* 317 U.S. at 499, 63 S.Ct. at 368 (discussing the broad scope of the affirmative act requirement); *see also United States v. Calles,* 482 F.2d 1155, 1158–60 (5th Cir. 1973) (defendant held assets in the names of others and denial of ownership was held to be a false statement); *United States v. Newman,* 468 F.2d 791, 794 (defendant held income generating assets in wife's name and denial of income was a false statement within the meaning of the statute), *cert. denied,* 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973).

III.

Pursuant to Fed.R.Crim.P. 12.2(b), appellant also filed a notice of intention to place in issue his mental condition by presenting expert evidence that he suffers from a pathological or compulsive gambling disorder. Appellant claimed that this expert testimony would tend to negate willful-

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fairness requires dismissal of an indictment which includes in one count what could be several independent charges, the Court must measure that indictment against the purposes of the prohibition against duplicity. *Shorter,* 608 F.Supp. at 879. These purposes include generally: (1) the prevention of double jeopardy, (2) an assurance of adequate notice to the defendant, (3) the provision of a basis for appropriate sentencing, and (4) the danger that a conviction was produced by a verdict that may not have been unanimous as to any one of the crimes charged. *Id; see United States v. Margiotta,* 646 F.2d 729, 733 (2d Cir. 1981). The District Court held that all four purposes were met here. We agree.

ness—an essential element of both the tax evasion and failure to pay counts. *United States v. Shorter*, 618 F.Supp. 255, 256 (D.D.C. 1985); *see also United States v. Bishop*, 412 U.S. 346, 359-61, 93 S.Ct. 2008, 2016-17, 36 L.Ed.2d 941 (1973). Briefly stated, appellant contended before the District Court that expert testimony would show that he suffered from a disorder that compelled him to expend nearly all of his available financial resources on gambling, leaving him with no funds to meet tax obligations. Appellant argued that this compulsion, rather than a willful intent to evade taxes, explained the conduct forming the basis for the indictment. Br. of Appellant at 11.

The District Court ordered that the expert testimony proffered by the defense not be admitted at trial. Appellant does not challenge on appeal the District Court's exclusion of the proffered expert testimony that compulsive gambling negated the element of willfulness because it rendered the appellant unable to control his behavior. *See* Br. of Appellant at 9-10. Rather, appellant now argues that the District Court erred in excluding the proffered expert testimony to explain that appellant's cash lifestyle is characteristic of compulsive gamblers—a recognized mental disorder—and therefore not an affirmative act of tax evasion or indicative of a knowing and voluntary violation of the tax laws. Br. of Appellant at 11. As the District Court noted, this closely related theory attempts to explain that the experts' familiarity with the personal habits of compulsive gamblers would help the trier of fact assess the government's claim that appellant's lifestyle is evidence of an intent to willfully evade and willfully fail to pay taxes. *Shorter*, 618 F.Supp. at 261 n. 14.

The District Court concluded that there was no compelling indication that appellant's gambling activities and their impact on his financial habits require the testimony of experts, as opposed to lay witnesses familiar with the appellant's activities. *Shorter*, 618 F.Supp. at 261 n. 14. We agree with this ruling that the proffered expert tes-

timony was properly excluded for this limited purpose. When the specialized knowledge of an expert is unnecessary to a jury's assessment of the salient factual issues, expert testimony will normally be excluded. *See e.g., United States v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir. 1976), *cert. denied*, 429 U.S. 1045, 97 S.Ct. 751, 50 L.Ed.2d 759 (1977).

Appellant contends that the District Court utilized an incorrect standard for determining the admissibility of the proffered testimony, thereby depriving appellant of his right present his defense. Br. of Appellant at 13. We discuss next the District Court's analysis on this issue.

Expert testimony is admissible when relevant under Fed.R.Evid. 702. The issue of relevance is the preliminary question of law to be decided by the court. *Shorter*, 618 F.Supp. 257; *see also United States v. Torniero*, 735 F.2d 725, 730 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110, 105 S.Ct. 788, 83 L.Ed.2d 782 (1985). A court possesses broad discretion when ruling on questions of relevance. *See, e.g., Salem v. United States Lines*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962); *United States v. Torniero*, 735 F.2d at 730. Even though relevant, evidence may be excluded by the trial court "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. *See United States v. Roark*, 753 F.2d 991, 994 (11th Cir. 1985).

In *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), this Court set forth the standard by which this and other Circuits have analyzed questions of admissibility of expert testimony based on new methods of scientific measurement. *See e.g., United States v. McDaniel*, 538 F.2d 408, 412-13 (D.C.Cir. 1976) (voice print spectrography); *United States v. Lewellyn*, 723 F.2d 615, 619 (8th Cir. 1983) (compulsive gambling), *United States v. Stifel*, 433 F.2d 431,

438 (6th Cir. 1970) (neutron activation analysis), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1232, 28 L.Ed.2d 531 (1971). *See also* 3 Weinstein's Evidence ¶ 702[03] at 702-15 (1982). *Frye* is still the law in this Circuit.

The *Frye* standard for determining whether a generic class of scientific evidence is to be admitted at trial requires that the theory from which the deduction is made "be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye, supra*, at 1014; *see also United States v. Addison*, 498 F.2d 741, 743 (D.C.Cir. 1974). The requirement of general acceptance in the relevant scientific community assures that those most qualified to assess the general validity and reliability of a scientific method will have the determinative voice. *United States v. Addison, supra*, at 744.

As the record and the Court's opinion reveal, the District Court focused on a three part test of the relevancy of expert testimony of pathological gambling. *Shorter*, 618 F.Supp. at 257. The District Court concluded that the testimony would be admitted if defendant were able to establish "(1) that a disorder known as 'pathological gambling' is recognized by the relevant community of experts; (2) that experts generally accept a causal link between pathological gambling and the failure to pay taxes; and (3) that the facts are sufficient to create a jury question as to whether the particular defendant suffers from a pathological gambling disorder." *Id.* After considering the evidence, the District Court made the following determinations with respect to the three part test mandated by *Frye*.

First. As a preliminary matter, the District Court correctly concluded that, with regard to the pathological gambling disorder, the relevant scientific community is the mental health community comprised of psychologists and psychiatrists. *Shorter*, 618 F.Supp. at 257; *see also United States v. Lewellyn, supra*, at 619. The District Court then

concluded, under the first prong of the *Frye* test, that the disorder has achieved general acceptance by mental health professionals and may be "recognized" as a disorder by the courts.

Second. Under *Frye*, the pathological gambling disorder must be relevant to one or more elements of the charged offense, in this case to the elements of tax evasion and willful failure to pay taxes. Appellant contended before the District Court that his compulsion for pathological gambling negated the element of willfulness required to convict for tax evasion or willful failure to pay. *Shorter*, 618 F.Supp. at 258.

A number of Circuits have concluded that a link between pathological gambling and criminal intent is not sufficiently accepted by mental health professionals to sustain the relevance of the disorder with respect to an insanity defense. *See e.g., United States v. Gould*, 741 F.2d 45, 52 (4th Cir. 1984) (robbery); *United States v. Torniero, supra*, at 732-34 (interstate transport of stolen goods); *United States v. Lewellyn*, supra at 619 (embezzlement). Certainly, the issue in an insanity case—that of a lack of substantial capacity to appreciate the wrongfulness of conduct or the requirements of the law—differs to some degree in theory from the issue of willfulness. *Shorter*, 618 F.Supp. at 258-59. Nevertheless, as the District Court noted, this Court has determined that the underlying question in such cases is whether the defendant had the mental state that must be proved as to all defendants. *See United States v. Brawner*, 471 F.2d 969 (D.C.Cir. 1972). Similarly, in this case, the issue is one of willfulness and specific intent.

The District Court did not rely solely on these appellate precedents. The Court also heard substantial testimony on whether experts generally accept a hypothesis about compulsive gambling that would tend to prove or disprove willfulness. *Shorter*, 681 F.Supp. at 259-60. Based on the testimony of defense and government experts, the District

Court concluded that there is no general acceptance among the experts in the relevant scientific community that there is a link between pathological gambling and the failure to pay taxes. *Shorter*, 618 F.Supp. at 260–61.

We are well aware that on appeal, appellant is not contesting the District Court's exclusion of the proffered expert testimony that the compulsion to gamble in and of itself negates willfulness. Br. of Appellant at 11 n. 11. Rather, rebuffed on his principal claim—the claim to which the District Court properly applied the three part *Frye* test—appellant now contends in a subsidiary claim that such expert testimony was admissible to rebut the government allegation that appellant's maintenance of a cash lifestyle was an affirmative act of evasion, rather than a symptom of his underlying pathological gambling disorder. *See* Br. of Appellant at 11. As the District Court recognized, however, this claim is "closely related" to appellant's principal claim that pathological gamblers are unable to pay their taxes. *Shorter*, 618 F.Supp. 258 n. 7, 261 n. 14.

Appellant's proffer of expert testimony regarding the characteristics of pathological gamblers fails the second prong of the *Frye* test. *See* Br. of Government at 29. Appellant's assertion that none of the government experts disputed the testimony of the defense experts that a cash lifestyle are common traits of pathological gamblers is without support in the record. Indeed, there was no clear agreement among the defense experts that a cash lifestyle, financial mismanagement, and the relinquishment of control over financial affairs are clinically accepted characteristics of compulsive gambling.

Appellant contends that this Court's test mandated by *Frye* does not apply to the proffered testimony here because this testimony related solely to the "uncontroverted characteristics of compulsive gamblers and not to novel scientific evidence such as polygraph tests." Br. of Ap-

pellant at 14 n. 12; Reply Br. of Appellant at 4. However, as we have just concluded, there was little agreement among the experts that cash lifestyle, financial mismanagement, and relinquishment of financial control were indeed "characteristics" of compulsive gambling accepted by the relevant mental health community.

In addition, as described earlier, even if appellant's proffered expert testimony met the three-part *Frye* test, the testimony was not admissible because there was no compelling indication suggesting that appellant's "gambling activities and their impact on his financial habits require the testimony of experts, as opposed to lay witnesses familiar with the [appellant's] activities." *See Shorter*, 618 F.Supp. at 261 n. 14; *see also United States v. Navarro-Varelas*, 541 F.2d at 1334. It is well established that when knowledge of an expert is unnecessary to a jury's assessment of the salient factual issues, expert testimony will normally be excluded. *Shorter*, 618 F.Supp. at 261 n. 14. *See, e.g., United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1977); *United States v. Buchbinder*, 614 F.Supp. 1561, 1568 (N.D.Ill. 1985). We conclude that the District Court's careful determination that the proffered expert testimony was cumulative and unnecessary did not constitute an abuse of discretion. *See e.g., United States v. Johnson*, 527 F.2d 1381, 1384 (D.C.Cir. 1976).

Appellant next argues, for the first time on appeal, that the expert testimony would give meaning to the appellant's conduct as a product of his compulsion, and not to any criminal intent. Br. of Appellant at 16; Reply Br. of Appellant at 6. Appellant relies on cases which suggest that expert testimony about the *modus operandi* of various offenses have been properly admitted as of appreciable help to the layperson jury. Br. of Appellant at 15–16. We do not rule on the general proposition in these cases or their application to this case. This use of expert testimony was not proffered below and therefore is not reviewable here.

Finally, appellant contends that the exclusion of the proffered expert testimony infringed upon the appellant's due process rights to present a defense. Br. of Appellant at 19. Appellant's claim is in error. The District Court did not deny appellant a right to present a defense. *See e.g., United States v. Davis*, 772 F.2d 1339, 1347-48 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 603, 88 L.Ed.2d 581 (1985). Rather, it ruled that the proffered expert testimony was irrelevant and unnecessary. The District Court was careful to note that its ruling should not be interpreted as precluding the appellant, "through lay testimony, including his own, to seek to persuade the jury regarding his gambling propensities related to his inability to pay his taxes when they were due." *Shorter*, 618 F.Supp. at 261 n. 16.

IV.

For the foregoing reasons, the decision of the District Court is, in all respects,

Affirmed.

APPENDIX B

UNITED STATES OF AMERICA
v.
JOHN A. SHORTER, JR.

Crim. No. 84-0421.

United States District Court,
District of Columbia.

Sept. 13, 1985.

Government moved to preclude defendant from introducing expert testimony on alleged compulsive gambling disorder, in prosecution for tax evasion and willful failure to pay taxes. The District Court, Harold H. Greene, J., held that: (1) pathological gambling disorder had achieved general acceptance by mental health professionals and could be recognized as a disorder, but (2) causal link between that disorder and tax evasion or failure to pay taxes was not established, precluding admission of expert testimony.

Motion to preclude granted.

Carol E. Bruce, Darryl W. Jackson, Asst. U.S. Attys., Washington, D.C., for Government.

Plato Cacheris, Larry S. Gondelman, Hundley & Cacheris, Washington, D.C., Marvin J. Garbis, Ronald B. Rubin, Garbis, Marvel & Junghans, Baltimore, Md., for defense.

MEMORANDUM ORDER

HAROLD H. GREENE, District Judge.

Presently pending before the Court is the government's motion to preclude the defendant from introducing expert

testimony on defendant's alleged compulsive gambling disorder. The issue has arisen in the following manner.

Defendant stands indicted for one count of tax evasion (26 U.S.C. § 7201) and six counts of willful failure to pay federal income taxes (26 U.S.C. § 7203). Pursuant to Fed.R.Crim.P. 12.2(b), he has filed a notice of his intention to place in issue his mental condition by presenting expert evidence that he suffers from a pathological gambling disorder. This expert testimony, it is claimed, will tend to negate willfulness—an essential element of both the tax evasion and failure to pay counts. *United States v. Bishop*, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973).[1] Defendant contends that expert testimony will show that he suffers from a disorder that compels him to expend nearly all of his available financial resources on gambling, leaving him no funds with which to meet his tax obligations. He further argues that it is this compulsion, rather than any intent to evade or fail to pay income taxes, which explains the conduct forming the basis of the indictment.[2] It is defendant's notice and the supporting arguments that prompted the government motion.

I

Expert testimony is admissible in a proper case under Fed.R.Evid. 702. However, to be admissible, such evidence

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[1] In a criminal tax case, willfulness means "a voluntary, intentional violation of a known legal duty." *United States v. Pompanio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976).

[2] The government's evidence will allegedly show that defendant engaged in a course of conduct spanning many years that was consciously and willfully designed to defeat the payment of income taxes. This conduct allegedly included *inter alia*, (1) concealment of personal assets, (2) making of false statements to agents of the Internal Revenue Service, (3) failure to pay taxes despite a filing of tax returns declaring a liability, (4) failure to satisfy numerous notices of deficiency, levies, and judgments by the Internal Revenue Service, (5) failure to keep any financial records, (6) failure to pay despite possession of available funds, and (7) defendant's poor history of non-payment of federal, state and local taxes.

must be relevant (Fed.R.Evid. 402), and the issue of relevance is a preliminary question of law to be decided by the court (*United States v. Torniero,* 735 F.2d 725, 730 (2d Cir. 1984), *cert. denied,* ___ U.S. ___, 105 S.Ct. 788, 83 L.Ed.2d 782 (1985); Fed.R.Evid. 104), which possesses broad discretion when ruling on that question. *Salem v. United States Lines,* 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962); *United States v. Torniero, supra,* at 730; 3 Weinstein's Evidence ¶ 702[02] at 702-12 (1982).

Because juries sometimes grant special deference to the testimony of an expert, courts seek to ensure that the subject matter of the expert testimony is reliable. *United States v. Addison,* 498 F.2d 741, 744 (D.C.Cir. 1974). On this basis, most courts hold that expert testimony may not relate to a scientific theory that is speculative or accepted by only a few members of the particular learned profession. Hence, this and other Circuits, as well as many States, follow the decision in *Frye v. United States,* 293 F. 1013 (D.C.Cir. 1923), which prohibits the admission of expert testimony unless the scientific subject matter of the testimony is generally accepted by the relevant community of experts. *United States v. McDaniel,* 538 F.2d 408, 412-13 (D.C.Cir. 1976) (voice print spectrography); *Frye v. United States, supra* (polygraph); *United States v. Lewellyn,* 723 F.2d 615, 619 (8th Cir. 1983) (compulsive gambling); *United States v. Stifel,* 433 F.2d 431, 438 (6th Cir. 1970) (neutron activation analysis). See also, 3 Weinstein's Evidence ¶ 702[03] at 702-15 (1982).[3]

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[3] While several courts have adopted a standard for admitting expert testimony that is less stringent calling only for "substantial acceptance" of the scientific subject matter by the relevant expert community (see *United States v. Gould,* 741 F.2d 45, 49 n. 2 (4th Cir.1984); ("substantial acceptance"); *United States v. Torniero, supra,* 735 F.2d at 724, 731 n. 9) (same)), *Frye* is still the rule in this Circuit. See *United States v. McDaniel, supra,* at 412-13. In any event, defendant's argument fails even under the less stringent standard.

Frye mandates a three-part inquiry into the relevancy of expert testimony, in this case expert testimony of pathological gambling. Such testimony will be admitted if the defendant is able to establish (1) that a disorder known as "pathological gambling" is recognized by the relevant community of experts; (2) that experts generally accept a causal link between pathological gambling and the failure to pay taxes; and (3) that the facts are sufficient to create a jury question as to whether the particular defendant suffers from a pathological gambling disorder.

II

After considering the evidence, the Court has concluded that, insofar as the pathological gambling disorder is concerned, the relevant scientific community is the mental health community, that is psychiatrists and psychologists generally. *United States v. Lewellyn, supra,* at 619.[4] With

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[4] Defendant appears to contend that the relevant scientific community is that of the limited number of psychologists and psychiatrists who specialize in pathological gambling disorders. The contention is clearly mistaken. It is, of course, always possible to locate a few experts in a field—such as the operation of polygraphs or the discovery of an exotic cure for cancer—who will be convinced of the efficacy of their particular methodology. But the *Frye* test demands an acceptance by a wider scientific community, precisely in order to eliminate those who are "experts" only in their own eyes and the eyes of a relatively small group of individuals with similar ideas.

The *Addison* court, rejecting a trial court's admission of spectrographic voice identification evidence, made plain that *Frye* requires that the subject matter of expert testimony be scientifically mature:

> Thus, while portions of the record suggest that spectrogram analysis may *become* a useful tool for the resolution of questions of criminal liability, it is equally clear that [the technique has] not attained the general acceptance of the scientific community to the degree required by *Frye*.

498 F.2d at 741 (emphasis supplied and footnotes omitted).

this predicate in mind, it is appropriate now to consider the three parts of the *Frye* test.

First. The experts presented by both the government and the defense appear to agree, with varying degrees of certainty, that pathological gambling is a recognized disorder. In this regard, the Court finds persuasive the inclusion of pathological gambling in the 1980 edition of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-III).[5] The fact that pathological gambling was not included in the Manual prior to 1980 indicates that the disorder has only recently been recognized by the mental health community. *United States v. Torniero, supra,* 735 F.2d at 731. Nevertheless, despite its relatively recent appearance in DSM-III, the Court concludes that the disorder has achieved general acceptance by mental health professionals, and that accordingly it may be "recognized" as a disorder by the courts.

Second. To be relevant in a prosecution charging tax evasion and willful failure to pay taxes, the pathological gambling disorder must be relevant to one or more elements of the charged offenses (*United States v. Peterson,*

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[5] DSM-III describes "pathological gambling" as a chronic and progressive failure to resist impulses to gamble and gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits. The gambling preoccupation, urge, and activity increase during periods of stress. Problems that arise as a result of the gambling lead to an intensification of the gambling behavior. Characteristic problems include loss of work due to absences in order to gamble, defaulting on debts and other financial responsibilities, disrupted family relationships, borrowing money from illegal sources, forgery, fraud, embezzlement, and income tax evasion.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders ¶ 312.31 (3d ed. 1980).

509 F.2d 408, 414 (D.C.Cir. 1974)), that is, the proferred testimony must "tend[] to prove or disprove a matter 'properly provable in the case.' " *United States v. Torniero, supra,* 735 F.2d at 730 (quoting Fed.R.Evid. 401 advisory committee note). The defense contends that testimony concerning a pathological gambling disorder is relevant[6] in that a pathological gambler is compelled by the internal mental pressures inherent in his disease to expend substantially all of his available funds for gambling, rather than for paying tax liabilities, and that this compulsion negates the element of willfulness required to convict for tax evasion or willful failure to pay.[7]

In deciding the relevance of pathological gambling to criminal intent, the Court does not write on a clean slate. Three Circuits have concluded that a link between pathological gambling and criminal intent is not sufficiently accepted by mental health professionals to sustain the relevance of the disorder with respect to an insanity defense. *United States v. Gould, supra,* at 52 (robbery); *United States v. Torniero, supra,* at 734 (interstate transportation of stolen goods); *United States v. Lewellyn, supra,* at 619

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[6] The government argues that defendant's proffer of expert testimony is an impermissible attempt to raise the defense of diminished capacity in a criminal tax case, contending that a diminished capacity defense is not recognized in this jurisdiction for any offense other than first degree murder. See *United States v. Brawner,* 471 F.2d 969 (1972) (en banc); *United States v. Peterson,* 509 F.2d 408 (1974); *Bishop v. United States,* 107 F.2d 297, 301 (D.C.Cir.1939). However, because the Court finds that there is no generally accepted link between pathological gambling disorder and a defendant's intent to commit tax offenses, it is not necessary to decide that issue. Moreover, as noted below, defendant claims that his experts would testify to the question of willfulness, not to that of diminished capacity.

[7] Alternatively, defendant offers the testimony on the closely related issue of an explanation for his so-called "cash lifestyle," failure to keep financial records and failure to maintain bank accounts in his own name—conduct which the prosecution seeks to portray as indicative of a knowing and voluntary violation of the tax laws.

(embezzlement).[8] To be sure, the issue in an insanity case—whether "as a result of mental disease or defect [a defendant] lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law"—differs to some extent in theory from the issue of willfulness. Nevertheless, as *Brawner v. United States, supra,* and other decisions make clear, it is somewhat of a misnomer to consider the defense under the rubric of diminished responsibility (much less sanity), and the real issue is one of willfulness and specific intent.[9]

Rather than to rely solely on these appellate precedents, this Court has heard substantial testimony on whether experts generally accept a hypothesis about compulsive gambling that would tend to prove or disprove willfulness.

The defense presented three experts.[10] The testimony of these defense experts was essentially similar. Each testified that pathological gamblers often fail to pay their taxes. Their testimony was less certain as to the existence of a causal link between the disorder and the absence of a

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[8] No Circuit has held to the contrary.

[9] The *Brawner* court wrote that its doctrine of diminished responsibility "has nothing to do with 'diminishing' responsibility of a defendant because of his impaired mental condition but rather with determining whether the defendant had the mental state that must be proved as to all defendants." *Brawner v. United States, supra,* 471 F.2d at 998.

[10] Dr. Joseph W. Ciarrocchi, a clinical psychologist, is Director of Addiction Services at Taylor Manor Hospital in Ellicott City, Maryland, where he supervises residential and out-patient programs for compulsive gamblers.He has treated the defendant since February 1985. Dr. Jule D. Moravec, a clinical psychologist of fourteen years experience, is Associate Director of the Veterans Administration Medical Center in San Diego, California and specializes in the research and treatment of pathological gambling. Dr. Harvey L.P. Resnik is a psychiatrist in private practice with over twenty-five years experience in psychiatry, and is a Clinical Professor at the George Washington School of Medicine. He has personally treated approximately twenty pathological gamblers.

willful intent to commit tax offenses. Dr. Moravec, who appears to have had the greatest experience treating pathological gamblers, opined that the pathological gambler "chooses not to" pay taxes in the belief that his funds, if devoted to gambling, will generate a "big win" that allows him to meet all outstanding obligations. Dr. Moravec's view of the disorder, even if accepted by the mental health community, would not tend to establish that compulsive gamblers are deprived of an ability to consciously choose between gambling and paying taxes. Furthermore, Dr. Moravec came even to this limited conclusion with respect to defendant notwithstanding the fact that defendant, according to the government, was able to make the choice of spending substantial amounts on an expensive automobile and on gifts to a girlfriend, and to make other significant nongambling expenditures. Dr. Moravec was also unable adequately to explain why defendant, a prominent and successful attorney during these same years, was able to organize and manage his law practice but unable to engage in financial planning to meet his tax liabilities.[11] In any event, the Court found Dr. Moravec's testimony to be vague and contradictory, and it takes into account the possibility that Dr. Moravec, who belongs to a very small group of psychologists specializing in pathological gambling, has an incentive to make rather sweeping claims about the illness. *See infra.*

Dr. Ciarrocchi also conceded that pathological gamblers "will prioritize their needs" and choose to make non-gambling expenditures that are important to them. In light of his limited experience as a practicing psychologist, Dr. Ciarrocchi's testimony was principally relevant to the history and treatment of defendant himself. Defendant's own experience is not, however of central relevance to the ques-

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[11] The witness acknowledged that not all pathological gamblers are not also tax evaders, and he simply answered "I don't know" when questioned why this was so.

tion of whether a causal link between the disorder and criminal intent is generally accepted by the mental health community.

Dr. Resnik, the most credible and qualified defense expert, essentially confirmed the testimony of Drs. Moravec and Ciarrocchi. While maintaining at one point, that a pathological gambler lacks the specific intent to commit tax offenses because he is irresistibly compelled to gamble with most of his funds, Dr. Resnik later testified that an individual, such as defendant, who embarks on a gambling spree (1) knows that he has failed to pay his taxes, and (2) makes a volitional choice to gamble rather than pay.

Finally, defendant's experts—all directly involved with the diagnosis and treatment of pathological gamblers—did testify that the gambling compulsion undermines the ability to comply with such laws as those relating to the payment of income tax, but they also in the main conceded that they were at the cutting edge of this field, and that the bulk of the community of psychiatrists and psychologists remains to be convinced.

The impression gleaned from the testimony of defendant's experts is that the impact of pathological gambling disorder on the volitional faculties is, at best, unclear even among those mental heatlh professionals specializing in the treatment of the disorder. It is, however, the broader community of psychologists and psychiatrists to which the Court must turn in assessing the reliability of expert testimony under *Frye (United States v. Lewellyn, supra,* 723 F.2d at 619), and as to them clarity is not lacking.

Each of the government's witnesses—three forensic psychiatrists and one forensic psychologist—categorically rejected the claim that pathological gamblers are unable to choose between gambling and paying taxes. Of greatest significance to the present case is Dr. Abraham L. Halpern's testimony that the "vast majority" of psychiatrists reject the proposition that pathological gamblers are un-

able to choose between gambling and paying taxes. Dr. Halpern, whom the Court has found to be an exceptionally well-qualified and persuasive witness,[12] testified that pathological gamblers retain the ability to make conscious decisions about their financial expenditures. The government's other experts, Dr. Neil H. Blumberg, David L. Shapiro and Raymond F. Patterson[13] each also offered the opinion that there exists no recognized link between pathological gambling and criminal tax offenses.

It should also be noted that it may not even be necessary for the Court definitively to resolve the disagreements between the experts. Under the *Frye* test, the issue is whether the existence "of a causal link between this disorder and commission of the type of offenses . . . charged" (*United States v. Gould, supra*, 741 F.2d at 48, quoting *United States v. Torniero, supra*, 735 F.2d at 731), commands "general acceptance" (*Frye v. United States, supra*, 293 F.2d at 1014), in the mental health community. The Court is firmly convinced, based on the evidence, that such general acceptance is lacking at the present time. While there are, to be sure, "seriously contradicting views"

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[12] Dr. Halpern is the Director of the Department of Psychiatry at United Hospital in Portchester, New York; a Clinical Professor of Psychiatry at New York Medical College; certified by the American Board of Forensic Psychiatry and the American Board of Psychiatry and Neurology; and co-author of an article on compulsive gambling that has been accepted by the *American Journal of Forensic Sciences*. His medical career spans more than thirty years.

[13] Dr. Blumberg is a psychiatrist in private practice with eight years of psychiatric experience, a diplomate of the American Board of Psychiatry and a Clinical Instructor at the University of Maryland School of Medicine. Dr. Shapiro is a forensic psychologist in private practice with sixteen years of experience and an Associate Clinical Professor at the George Washington University School of Medicine and Health Services. Dr. Patterson, a psychiatrist, is the Acting Associate Superintendent of General Clinical Programs at Saint Elizabeths Hospital, board certified by the American Board of Psychiatry and Neurology, and an Assistant Professor of Psychiatry at Howard University.

(*United States v. Torniero, supra*, 735 F.2d at 731), it is quite clear that there is no general acceptance among the experts in the relevant scientific community that there is a link between the pathological gambling and the failure to pay taxes.[14]

Finally, one must not completely disregard the consequences of the theories offered in support of the admission of the expert testimony proffered by defendant. If these experts are correct, it would be difficult, if not impossible, to establish a principled dividing line between a lawyer who evades his income taxes on account of his compulsive gambling, and an individual who craves alcohol or drugs and commits robberies or other, similar offenses to obtain the funds to satisfy his needs. In both types of instances, there could be presumed to be compelling forces which cause the individual to violate the law, and under the theory of defendant here, both must be exonerated. That is not, and cannot be, the law. See *United States v. Moore*, 486 F.2d 1139, 1147 (D.C.Cir), *cert. denied*, 414 U.S. 980, 94 S.Ct. 298, 38 L.Ed.2d 224 (1973) (concurring opinion of three judges) (narcotics addiction is not a defense to prosecution for possession of heroin);[15] *United States v.*

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[14] As indicated in note 7, *supra*, defendant contends that the experts' familiarity with the personal habits of compulsive gamblers would help the trier of fact to assess the government's argument that defendant's lifestyle is evidence of an intent to willfully evade and willfully fail to pay taxes. However, the Court has been given no compelling indication suggesting that defendant's gambling activities and their impact on his financial habits require the testimony of experts, as opposed to lay witnesses familiar with the defendant's activities. When the specialized knowledge of an expert is unnecessary to a jury's assessment of the salient factual issues, expert testimony will normally be excluded. See, *e.g., United States v. Navarro-Varelas*, 541 F.2d 1331, 1334 (9th Cir.1976) (expert defense testimony that would be cumulative of lay testimony and of no appreciable help to jury was properly excluded), *cert. denied*, 429 U.S. 1045, 97 S.Ct. 751, 50 L.Ed.2d 759 (1977).

[15] The *Moore* court approved the exclusion of expert testimony that would have portrayed defendant as "helpless to control his compulsion

Lyons, 731 F.2d 243, 245 (5th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 323, 83 L.Ed.2d 260 (1984) (narcotics addiction, without more, raises no issue of mental disease that can be used as a defense to prosecution for narcotics offenses). *See also, Powell v. Texas*, 392 U.S. 514, 535, 88 S.Ct. 2145, 2155, 20 L.Ed.2d 1254 (1968) (defendant's allegedly irresistable urge to drink did not preclude conviction for public intoxication).

It may be that an alcoholic or an addict is entitled to consideration in terms of the availability of a lack of willfulness defense while in a state of intoxication or under the direct influence of the illegal substance. But such substance abusers are not regarded as deprived of free will for offenses committed during "lucid" intervals. The claim made on behalf of this defendant is that never, during a twelve-year period, was he sufficiently free from the pathological gambling disorder to pay his taxes (even though, among other things, he managed during this period to operate a busy and highly-regarded litigation practice).

Third. In light of the Court's conclusion that expert evidence on pathological gambling disorder is not relevant to the offenses charged and will not be admitted, it is unnecessary to decide whether defendant himself meets the profile of a pathological gambler, and the Court renders no decision thereon.

For the reasons stated, it is this 13th day of September, 1985

ORDERED that the expert testimony proferred by the defense will not be admitted at the trial.[16]

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to obtain and use heroin." 486 F.2d at 1143. The defendant's proffer in *Moore* was remarkably similar to the evidence proffered by defendant here.

[16] This ruling should not be interpreted as precluding the defendant, through lay testimony, including his own, to seek to persuade the jury regarding his gambling propensities related to his inability to pay his taxes when they were due.

APPENDIX C

UNITED STATES OF AMERICA
v.
JOHN A. SHORTER, JR.

Crim. No. 84-00421

United States District Court,
District of Columbia

March 26, 1985.

On motion to dismiss single felony count of willful attempt to evade payment of income taxes due for years 1972 through 1983, the District Court, Harold H. Greene, J., held that: (1) case would not be subject to dismissal even with respect to evasion of taxes due before limitations period if it were supported by proof of affirmative acts of evasion committed within past six years if such acts related to taxes due in earlier years; (2) tax evasion covering several years could be charged in single count as course of conduct in circumstances at bar; but (3) defendant would be entitled to protection against danger that he would be convicted not on basis of unanimous verdict on single set of facts but under juror votes which, depending on particular member of jury, related to entirely different years.

Motion denied.

Joseph E. diGenova, U.S. Atty., Carol E. Bruce, Darryl W. Jackson, Asst. U.S. Attys., Washington, D.C., for prosecution.

Plato Cacheris, Larry S. Gondelman, Hundley & Cacheris, Washington, D.C., for defense.

OPINION

HAROLD H. GREENE, District Judge.

Defendant was indicted in one felony count of willful attempt to evade the payment of income taxes due for the years 1972 through 1983, in violation of 26 U.S.C. § 7201, and in six misdemeanor counts of willful failure to pay income tax for each of the years 1978 through 1983, in violation of 26 U.S.C. § 7203. Presently pending before the Court is defendant's motion to dismiss the tax evasion count. The motion claims (1) that defendant is being charged with acts which are barred by the statute of limitations, and (2) that this count is impermissibly duplicitous because it incorporates twelve separate offenses. The Court has carefully reviewed the grounds advanced by defendant, and it has concluded that the motion must be denied.

I

Statute of Limitations

The statute of limitations for tax evasion is six years. 26 U.S.C. § 6531. Since the indictment in this case was returned in 1984, it bars prosecution for offenses committed before 1978. However, the statute of limitations does not *ipso facto* rule out prosecution with respect to taxes owing prior to 1978, for the offense of tax evasion is not necessarily committed only in the year when the tax was due and payable. That is so because the existence of a tax deficiency is but one of the two essential elements of the crime, the other being an affirmative act of willful evasion. *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); *Spies v. United States*, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943).[1]

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[1] The Supreme Court in these cases referred to three elements: (1) failure to pay the tax, (2) and affirmative act of evasion, and (3) willfulness. For purposes of the present analysis, it is appropriate to telescope the second and third elements into one.

An act constituting evasion which occurs during the limitations period brings the prosecution within the statute of limitations even if the taxes being evaded were due and payable prior thereto. *United States v. Trownsell,* 367 F.2d 815 (7th Cir.1966); *United States v. Mousley,* 194 F.Supp. 119 (E.D.Pa. 1961), *aff'd without opinion,* 311 F.2d 795 (3d Cir.1963); United States v. Sclafani, 126 F.Supp. 654 (E.D.N.Y.1954), *aff'd on other grounds,* 265 F.2d 408 (2d Cir.1959); see also, *United States v. Malnik,* 348 F.Supp. 1273 (S.D.Fla.1972), *aff'd on other grounds,* 489 F.2d 682 (5th Cir.1974).

It follows that the indictment in this case is not subject to dismissal even with respect to the evasion of taxes due prior to 1978 if it is supported by proof of one or more affirmative acts of evasion committed by the defendant within the past six years if these acts relate to taxes due in earlier years.

The government claims that it will prove acts of evasion occurring within the limitations period which relate to the nonpayment of taxes during the years prior to that period.[2]

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[2] To be sure, the relationship between specific acts of evasion with specific failures to pay taxes is not spelled out in the indictment. Defendant contends that this failure renders the felony count fatally defective, and further that this defect cannot be remedied by a bill of particulars because such a bill would usurp the functions of the grand jury. Motion to Dismiss at 5. This argument lacks merit.

An indictment is sufficient if it contains the elements of the offense, fairly informs the defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecutions. *Hamling v. United States,* 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974); *Russell v. United States,* 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-47, 8 L.Ed.2d 240 (1962); *United States v. Debrow,* 346 U.S. 374, 74 S.Ct. 113, 98 L.Ed. 92 (1953); *United States v. Haldeman,* 559 F.2d 31, 123-26 (D.C.Cir.1976); *United States v. Conlon,* 628 F.2d 150, 156 (D.C.Cir. 1980), *appeal after remand,* 661 F.2d 235 (D.C.Cir.1981). See also, Fed.R.Crim.P. 7(c)(1).

The validity of an indictment in this respect is to be determined

It is clear that, on this basis. the statute of limitations as such[3] is not a bar.

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upon practical rather than technical grounds. *United States v. Guthartz*, 573 F.2d 225, 227 (5th Cir.1978); *United States v. Haas*, 583 F.2d 216 (5th Cir.1978). The test is not whether the indictment might have been drawn with greater certainty and exactitude, but whether it sets forth the elements of offense and sufficiently apprises defendant of the charges. *United States v. London*, 550 F.2d 206, 211 (5th Cir.1977); *United States v. Haldeman, supra*, 559 F.2d at 124.

In this case, the indictment clearly alleges violation of a cited statute, sets forth all the essential elements of the crime (see *supra* note 1), and details both the amount of the tax deficiencies and the methods alleged to have been employed by defendant to evade the payment of these taxes. This is sufficient to inform him of the charges against him and to protect him against double jeopardy. Furthermore, with respect to concerns over double jeopardy, it is established that the entire record of a criminal proceeding, not merely the indictment, is utilized to determine the scope of a previous prosecution. *Russell v. United States*, 369 U.S. 749, 764, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1961);*United States v. Haldeman, supra*, 559 F.2d at 126; 1 Wright, *Federal Practice and Procedure* § 125 at 233. The record in this case is already clear that this prosecution will bar any further prosecution for tax evasion related to any act of evasion occurring between 1978 and 1983. See also, Part III, *infra*. Thus, the indictment is legally sufficient to call for trial on the merits.

While a bill of particulars cannot cure a defective indictment, *Russell v. United States, supra*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; *United States v. Conlon, supra*, 628 F.2d 150 (D.C.Cir.1980), it may be useful to assist a defendant in preparation for trial where the indictment is sufficient but not detailed. *United States v. Hass, supra*, 583 F.2d at 221. In this case, the government's memorandum in opposition to the motion to dismiss contains a detailed account of its case and provides ample information about the prosecution version of the facts so as to enable defendant to prepare his case. Any lack of specificity has been cured by this detailed accounting of the government's case and by ongoing discovery, and defendant conceded as much during the hearing on this motion.

[3] The question of the statute of limitations in relation to defendant's claim of impermissible duplicity is explored below.

II

Duplicity

More substantial is defendant's contention that the indictment is impermissibly duplicitous in that it charges twelve separate offenses—evasion of taxes due for twelve separate years—as a single offense.[4] For purposes of analysis, this argument requires consideration of two questions: first, whether the defendant's alleged actions may legitimately be regarded as a single, continuous course of conduct and hence as a single offense, and second, whether the defendant would be prejudiced by his prosecution on a single-count basis.

A. Tax Evasion Charges

As a general matter, an indictment is not impermissibly duplicitous even though it alleges more than one offense in a single count if the offenses being charged bear such a relationship to one another that they constitute a continuing course of conduct. Se, *e.g., United States v. Mangieri,* 694 F.2d 1270, 1282 (D.C.Cir.1982); *United States v. Robin,* 693 F.2d 376 (5th Cir.1982); *United States v. Berardi,* 675 F.2d 894 (7th Cir.1982); *United States v. Margiotta,* 646 F.2d 729 (2d Cir.1981); *United States v. Alsobrook,* 620F.2d 139 (6th Cir.1980); *United States v. Canas,* 595 F.2d 73 (1st Cir.1979); *United States v. Girard,* 601 F.2d 69 (2d Cir.1979); *United States v. Zeidman,* 540 F.2d 314 (7th Cir.1976); *United States v. Daley,* 454 F.2d 505 (1st Cir.1972); *United States v. Pavloski,* 574 F.2d 933 (7th Cir.1968). That much is conceded by the defendant. However, he argues that, whatever may be true with respect to other types of offenses, this rule does not apply to the evasion of income taxes. That offense, it is said, is

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[4] Duplicity is the joining in a single count of two or more distinct and separate offenses. *United States v. Mangieri,* 694 F.2d 1270, 1281 (D.C.Cir.1982); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 142 (2d ed. 1982).

time-specific, that is, each offense is tied to a particular year,[5] and the charging of tax evasion in a single count with respect to more than one year is therefore *per se* impermissibly duplicitous.

A number of decisions are cited in support of this contention; however, none of them is conclusive or even persuasive. Those decisions that involved construction of the Internal Revenue Code at all,[6] by and large[7] merely upheld jury decisions to charge evasion in as many counts as there

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[5] Income taxes are, of course, due and payable on an annual basis. *United States v. Goldberg*, 206 F.Supp. 394, 397 (E.D.Pa. 1962), *aff'd*, 330 F.2d 30 (3rd Cir.1964).

[6] Two of the cases cited arose out of the Immigration and Naturalization Act provision which permits the deportation of individuals convicted of two crimes unless both convictions arise out of the same scheme of criminal misconduct. *Costello v. Immigration and Naturalization Service*, 311 F.2d 343 (2d Cir.1962), *rev'd on other grounds*, 376 U.S. 120, 84 S.Ct. 580, 11 L.Ed.2d 559 (1964); *Chanan Din Khan v. Barber*, 147 F.Supp. 771 (N.D.Cal.1957), *aff'd*, 253 F.2d 547 (9th Cir.1958). In both cases the individuals were convicted of failure to pay taxes in two separate years, and both time the courts rejected the argument that these two incidents arose out of the same criminal scheme. These decisions do not help defendant, however, not only because the courts there were construing the immigration laws, not the tax laws, but also because of the rationale on which the cases were decided. In *Costello*, a deportation case involving the well-known mobster, the court stated that charges of tax evasion for two separate years are two separate crimes "in the absence of additional facts to support an inference that the two crimes are related." In *Chanan Din Khan*, the court stated that the evidence indicated that defendant's success in his scheme to defraud in 1947 encouraged a repeat performance in 1948—not that there was one continuing scheme.

[7] *United States v. Goldberg, supra*, 206 F. Supp. at 397, held that since a willful attempt to evade taxes due in one year is a separate offense from a like attempt to evade for another year, any conspiracy to evade taxes must be charged as a separate offense for each year of the conspiracy. This view was expressly rejected in *United States v. Baker*, 262 F.Supp. 657, 684 (D.D.C.1966), and *Lott v. United States*, 309 F.2d 115, 120-21 (5th Cir.1962). See also, *United States v. Haskell*, 327 F.2d 281, 284 (2d Cir. 1964).

were years; [8] they do not stand for the opposite proposition: that an indictment which charges tax evasion for more than one year is impermissibly duplicitous. The cited decisions would buttress defendant's argument in this case only if the rule were that conduct which *may* be charged in several counts *must* be so charged or be subject to dismissal on duplicity grounds. But that is not the law. To the contrary, it is well established that two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme. *United States v. Mangieri, supra,* 694 F.2d at 1281-82; *United States v. Robin, supra,* 693 F.2d at 378; *United States v. Elam,* 678 F.2d 1234, 1250 (5th Cir.1982); *United States v. Berardi, supra,* 675 F.2d at 898; *United States v. Margiotta, supra,* 646 F.2d at 733; *United States v. Alsobrook, supra,* 620 F.2d at 142-43; *United States v. Girard, supra,* 601 F.2d at 72.

The grand jury, presumably under the guidance of the prosecutor, may charge few or many counts depending upon a variety of factors, and, absent oppression or impermissible duplicity, the decision with respect thereto is within the realm of grand jury and prosecutorial discretion. *United States v. Alsobrook, supra,* 620 F.2d at 142; *United States v. Berardi, supra,* 675 F.2d at 898; *United States v. Pavloski, supra,* 574 F.2d at 936; *United States v. Margiotta, supra,* 646 F.2d at 733.[9]

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[8] See *United States v. Smith,* 335 F.2d 898 (7th Cir.1964); *Norwitt v. United States,* 195 F.2d 127 (9th Cir.1952); *United States v. Johnson,* 123 F.2d 111, 119 (7th Cir.1941), *rev'd,* 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943); *United States v. Sullivan,* 98 F.2d 79, 80 (2d Cir.1938).

[9] Indeed, because of the wide discretion possessed by grand juries and prosecutors in this regard, and because that discretion has in recent years often been exercised in favor of multiple charges, the argument

The few cases in which the issue of duplicity has been directly decided, or even discussed, in the context of income tax evasion support this conclusion. At least three courts have found it permissible to charge conspiracy to evade several years' taxes as one count. *United States v. Baker, supra,* 262 F.Supp. 657; *Lott v. United States, supra,* 309 F.2d 115; *United States v. Haskell, supra,* 327 F.2d 281. And in what is apparently the only decision to have considered directly the issue whether tax evasion itself could be charged in a single count covering more than one year's taxes, the court held this practice to be proper. *United States v. England,* 229 F.Supp. 493 (E.D.Ill.1964).[10]

For these reasons, the Court concludes that defendant's duplicity argument stands or falls not on the narrow basis of tax evasion law but how it measure up against more general principles. These will now be considered.

B. Continuing Offense Principles

Case law suggests that two factors are critical to the determination whether particular conduct may be charged as a continuing offense in a single count: (1) the language and legislative history of the statute, and (2) the nature

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now most frequently advanced by criminal defendants is not duplicity but that the prosecution impermissibly multiplied charges, either to induce a guilty pleas to some of them or to expose the defendant to an extended prison sentence. Perhaps because of this phenomenon, there are few recent complaints of, and reported decisions dealing with, duplicity. It may be noted that in this case the government professes that it sought only a single felony count rather than twelve so as not to be accused of oppression of this defendant.

[10] That case is of dubious precedental value, however, because the decision of the District Court was reversed on other grounds, the Court of Appeals noting that it was not necessary to discuss the remaining specifications of error. *United States v. England,* 347 F.2d 425, 436 (7th Cir.1965). In two other cases—*Cohen v. United States,* 297 F.2d 760, 769-70 (9th Cir.1962), and *United States v. Swallow,* 511 F.2d 514 (10th Cir.1975)—the courts affirmed convictions where the indictments charged willful evasion for several years in one count, but in neither case was there any discussion of duplicity.

of the proscribed conduct. See *United States v. UCO Oil Co.*, 546 F.2d 833 (9th Cir.1976).[11]

Neither the language of the tax evasion statute nor its legislative history shed much light on the question whether it is proper to charge a continuing scheme to evade taxes for several years. The statute makes it a felony for any person to "willfully attempt[ ] in any manner to evade or defeat any tax imposed by this title or the payment thereof." The Supreme Court has recognized that this language defines a very broad spectrum of conduct, holding that

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its efforts to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By the way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or

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[11] The Ninth Circuit in the *UCO Oil Co.* case noted the legislative history as a factor separate from the statutory language, and it further referred to yet another factor—the appropriateness of multiple punishment for the conduct charged. To the extent that the multiple punishment factor has relevance here, it is of no assistance to defendant. If the indictment had charged twelve separate counts even though there was but a single course of conduct involving a single continuing intent, it could well be argued and held that it was unfair to subject the defendant to multiple punishment therefor. The obverse of the coin, of course, is that a single count covering all twelve years is both more appropriate and not impermissibly duplicitous. See *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *United States v. Robin*, *supra*, 693 F.2d at 379; *United States v. UCO Oil Co.*, *supra*, 546 F.2d at 837-38.

> covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Spies v. United States, supra, 317 U.S. at 499, 63 S.Ct. at 368. While this language is certainly not conclusive upon the question under consideration here, it does seem to contemplate with respect to this offense the kinds of acts which typically would be committed on a multi-year, continuing-course-of-conduct basis.[12]

Pointing toward the same conclusion is the other principal factor referred to by the *UCO Oil Co.* court—the nature of the conduct involved.[13] Briefly stated, the government charges the following.[14]

Since at least 1973, the defendant, a prominent criminal defense attorney in the District of Columbia, has conducted all his professional and personal business in cash, maintaining no bank accounts, office ledgers, or receipts or disbursement journals. He received all legal fees in cash; he possessed no credit cards; and he never acquired assets (such as real property or automobiles) which could be attached pursuant to a judgment or otherwise. Additionally, defendant never met any of the employer reporting and contribution requirements of federal law; and he never filed estimated income tax returns.

Defendant's former law partner opened two bank accounts in her own name, but the accounts were, in fact,

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[12] The legislative history provides no additional clues on this question. See 1954 United States Code Con. and Admin. News 4572, 5251, and 5343.

[13] The court in *UCO Oil* considered under this rubric not only the words of the particular statute but also the specific conduct being charged in the case there under review. See also *United States v. Mangieri, supra.*

[14] See Opposition to Defendant's Motion to Dismiss.

used by defendant not only for joint office expenses but also for his own personal expenditures. Between 1974 and 1983, a total of over $1.5 million was deposited in these accounts, one-half of which constituted defendant's income,[15] and defendant spent considerable sums for various purposes, including provisions for his own personal needs, the payment of gambling expenses, and payments to a girlfriend.

Although defendant reported a total income for the twelve years from 1972 through 1983 of $387,438.96 on which there was a tax due, not counting interest and penalties, of $134,866.40, he made only two $2,500 tax payments during that period, both in the context of and to forestall federal or local criminal tax investigations. During that same period, the IRS obtained at least nine civil tax judgments against defendant,[16] but because of his cash method of operation, and his failure to acquire bank accounts or tangible assets, the IRS was never able to collect on any of these judgments.[17]

These activities, should they be proved, could be regarded as evidencing a continuing course of conduct.[18] The establishment and maintenance of a cash method of operation, the establishment and long-term maintenance of accounts for the benefit of defendant in the name of an-

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[15] Nevertheless, on four different occasions between 1975 and 1980, defendant stated that he had neither cash nor bank accounts.

[16] The most recent such judgment was secured in 1982, in the amount of $108,105 for the years 1970 through 1975.

[17] In 1974 in federal court in Baltimore, defendant pleaded no contest to a criminal tax charge for failure to file income tax returns in 1968 and 1979. He was placed on probation and fined. He paid that fine, but again he failed to pay the tax due.

[18] That issue is entirely separate from the question whether defendant's failure to pay was willful, or whether there were other, legitimate reasons for that failure. Willfulness, obviously, is a matter to be proved by the government at trial.

other, and the making of substantial expenditures for many years notwithstanding claims of lack of resources—which are the crux of the government's case—are not likely to be attributable, consistently with reality[19] only to the year in which a particular act occurred.[20]

The same conclusion emerges from a consideration of the alternatives. If the present indictment were to be dismissed as duplicitous, and the government secured an indictment with twelve felony counts, each attributable to a particular year since 1972, the question would immediately arise as to how the evidence sketched out above was to be treated in the resulting trial.

The government's theory is—and in a new, multi-count indictment it presumably again would be—that each affirmative act of evasion was intended to evade payment of all taxes known to be owing or which defendant expected to become owing at the time of the affirmative act. Thus, the first count of such a hypothetical indictment presumably would allege evasion of taxes due in 1972. In support of that count, the government would be entitled to introduce evidence of a tax deficiency in 1972 as well as any and all affirmative acts of evasion after 1978[21]

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[19] For example, if, as the government apparently claims, defendant established an account in his partner's name in 1974, with the intention thereafter to use one-half of the funds as his own, the creation of the account would most likely have significant for tax evasion purposes for as long as the account existed and was used for defendant's personal purposes.

[20] The various failures to file estimated tax returns and the failures to pay notwithstanding judgments could more readily be attributed to particular years, but these matters are in a sense subsidiary to what, if the government's allegations are true, was a continuing scheme or plan.

[21] That is, during the limitations period. Acts of evasion occurring between 1972 and 1978 would probably also be admissible, especially where—as in the instance of the establishment of a bank account in the name of another—they had continuing consequences.

which may have been intended to evade payment of the 1972 taxes.

In other words, the same evidence that the government apparently intends to produce with respect to the present single-count indictment covering twelve years would be admissible to support the first count (in a twelve-count indictment) charging the evasion of taxes due in 1972, and this same evidentiary pattern could and would be repeated eleven more times, that is, with respect to each subsequent count. The defendant would be not better off in terms of the trial evidence and the jury's preceptions than he is under the present indictment; he would most likely be worse off.[22] At the same time, such a departure from reality would likely be unnecessarily confusing to the jury.

For these reasons, the Court concludes that tax evasion covering several years may charged in a single count as a course of conduct in circumstances such as these where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years.[23]

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[22] Additionally, indictment on twelve separate counts would expose the defendant to possible punishment in multiples of his exposure under the present indictment. If the jury were to accept the government's evidence and conclude that the affirmative act of maintaining a cash lifestyle, say, in 1983 was directed not only at evading taxes due in that year but at all taxes due and assessed in earlier years for which the Internal Revenue Service could otherwise have collected, defendant could be found guilty of twelve felony violations based upon that one affirmative act.

[23] It is clear that the Internal Revenue Code has sufficient flexibility to permit a finding that it is violated through a course of conduct. See *Sansome v. United States, supra*, 380 U.S. at 350-51, 85 S.Ct. at 1009-10, and *Spies v. United States, supra*, 317 U.S. at 497, 63 S.Ct. at 367, where the Supreme Court stated that:

> [Section 7201 is] the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

III

Fairness to Defendant

An indictment should be dismissed as impermissibly duplicitious notwithstanding the considerations discussed above if trial on a single count would be unfair to the defendant. *United States v. Alsobrook, supra,* 620 F.2d at 142; *United States v. Berardi, supra,* 675 F.2d at 898; *United States v. Pavloski, supra,* 574 F.2d at 936; *United States v. Margiotta, supra,* 646 F.2d at 733; see also, *United States v. Robin, supra,* 693 F.2d at 378. In order to determine whether fairness requires dismissal of an indictment which includes in one count what could be several independent charges, the Court must measure that indictment against the purposes of the prohibition against duplicity. These purposes are generally held to be: (1) the prevention of double jeopardy, (2) an assurance of adequate notice to the defendant, (3) the provision of a basis for appropriate sentencing, (4) the danger that a conviction was produced by a verdict that may not have been unanimous as to any one of the crimes charged. *United States v. Margiotta, supra; United States v. Pavloski, supra,* 574 F.2d at 936; *United States v. Starks,* 515 F.2d 112, 116 (3rd Cir.1975). The Court now considers this case tested against those purposes.

First. In the context of the rule against duplicitous indictments, the double jeopardy threat is acute primarily where the indictment implicitly charges violation of several different statutes which share some common element or elements or where it is not clear what laws are alleged to have been violated. See, *e.g., United States v. Elam, supra,* 678 F.2d 1234, 1250-51 (5th Cir.1982); *United States v. Orzechowski,* 547 F.2d 978, 986-87 (7th Cir.1976). In such situations, there is always a danger that the government, having failed in one prosecution, will initiate another, arguing that the object of the new indictment was not encompassed under the earlier charge.

That danger is largely, if not entirely, nonexistent in a case such as this where the indictment is duplicitous, if at all, only because it charges tax evasion with respect to more than one year. Only one statute is involved, and there can therefore be no confusion in that respect. Moreover, it is clear from the indictment itself and from the "bill of particulars" which the prosecution has furnished the defendant (see note 2, *supra*) that the pending indictment encompasses all acts of income tax evasion by this defendant during the years 1972 through 1983. Upon inquiry by the Court, government counsel reaffirmed that all such acts during these twelve years are included in Count I of the indictment.[24] In short, whether defendant is acquitted or convicted on the felony count of the present indictment, he is protected from a new income tax evasion charge for any of these years on the basis of any act or omission occurring prior to the return of that indictment. For these reasons, the danger of double jeopardy is entirely absent.

Second. The need to provide a defendant with notice of the charges against him raises issues that are similar to those which are presented by the double jeopardy issue. Unlike someone who is charged in a single indictment with violation of what may appear to be several overlapping laws, only a single statute is here involved. Defendant knows from the indictment itself that he is being prose-

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[24] During the hearing on this motion the government stated that, inasmuch as it was not charging the defendant with attempting to evade taxes by underreporting, if evidence of underreporting came to light, the defendant conceivably could hereafter be charged with the distinct offense of filing false returns. However, insofar as tax evasion is concerned, government counsel acknowledged that defendant could not, in a successive prosecution, be charged with that offense for the years 1972 through 1983. This concession, in addition to the record of the trial, would be available to the defendant in support of a plea of double jeopardy in any future proceeding. *United States v. Haldeman*, *supra*, 559 F.2d at 126.

cuted for an alleged violation of that single statute by evading taxes due in twelve specified successive years. If that indictment had been broken down by the grand jury into twelve counts, each relating to one of these years, but otherwise identical in language, defendant would have had no more precise or ample notice of the charges against him than he has under the present indictment. Thus, the alleged duplicity of the indictment does not raise notice problems. If defendant has any such problems, they arise from the fact that the exact means of committing the offense, *i.e.*, what specific actions will be proved by the government are not specified in the indictment. However, as discussed in note 2, *supra*, such specificity is not required by the law. Moreover, as noted above, the charges have been so fully amplified by the government's papers and by the discovery it has provided to defendant that lack of adequate notice cannot legitimately be asserted.

Third. A number of decisions suggest that a duplicitous indictment presents the danger that a general verdict of guilty on the count will not disclose the complete range of jury findings, and that this could prejudice the defendant in sentencing. *United States v. Starks*, *supra*, 515 F.2d at 116; *United States v. Margiotta*, *supra*, 646 F.2d at 733. This concern, once again, would be more of a problem if this indictment contained a single count containing disparate charges arising under different statutes. Where, as here, the alleged duplicity lies in a charge under a single statute by conduct which occurred over a longer period of time, any sentencing and consequent appellate review problems are substantially mitigated.

Furthermore, the sentencing issue is in one sense but a subset of the unanimous verdict problem discussed below. Although defendant has not elaborated on this point, his argument presumably would appear to be that the Court's sentence, in the event of a conviction, might be dependent upon the number of separate years of evasion which underlay the jury's verdict. However, as indicated *infra*, in

the event of a guilty verdict, the Court intends to ascertain from the jury what is encompassed by that verdict. Moreover, since the basic prosecution theory is that there was a continuing course of conduct, it is not likely to be decisive on any sentence how many years of evasion were involved in the scheme if a scheme is ultimately proved. Finally, a court is not limited in imposing sentence to the specific facts found by the jury through its verdict, but it may take into account the surrounding circumstances.[25]

Fourth. The most serious issue with regard to fairness is that of a possible lack of unanimity of the jury under the indictment and the proposed evidence in the event of a guilty verdict. It is conceivable, for example, that some jurors might vote for conviction on the basis that defendant took actions to evade federal income taxes in 1980 but not in 1979, while other members of the jury might so vote on precisely the opposite basis. This unanimity problem is exacerbated (1) by the statute of limitations issue, and (2) by the government's theory that the intentional acts of evasion relate to each and to every failure to pay and that they cannot be allocated to one particular year's failure. With these complications, it is possible to postulate that some jurors will vote for conviction on the ground that defendant failed to pay taxes in 1973 (outside the statute of limitations) but that in 1982 (during the limitations period) he committed willful, affirmative acts of evasion relating to the taxes owing for the earlier year. Other jurors, in turn, might have entirely different bases for their votes of guilty both regarding the year during which defendant did not pay, the year when he committed the acts of

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[25] See 18 U.S.C. § 3552, 3553, and Fed.R.Crim.P. 32(c). Before sentencing "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972), and he may even consider evidence of crimes of which defendant was neither tried nor convicted. *United States v. Johnson*, 507 F.2d 826 (7th Cir.1974).

evasion, and the years in which he formed or otherwise possessed and evidenced the intent to evade the payment of taxes.

The Court has concluded that, while for the reasons discussed in Part II above, the prosecution may go forward on the basis of the present indictment, the defendant is entitled to be protected against the danger that, on such an indictment, he will be convicted not on the basis of one unanimous verdict on a single set of facts but under juror votes for conviction which, depending on the particular member of the jury, relate to entirely different years.

Both interests may be accommodated by appropriate jury instructions and special interrogatories to the jury.[26] To this end, the Court intends to instruct the jury in some detail on these issues and to request it to answer special interrogatories.

Initially, the Court expects to instruct the jury that, while it may consider both evidence of a failure to pay taxes and evidence of tax evasion occurring prior to 1978, it may not convict the defendant unless it finds that he took affirmative steps to evade income taxes after 1978, and further that it may not return a guilty verdict unless there is unanimity with respect to at least one act of evasion since that year.

More specifically, the Court intends to instruct the jury that, to return a verdict of guilty on the felony count, it must agree unanimously (1) that during one or more specific years since 1972 the defendant failed to pay his federal income taxes, (2) that after 1978 he willfully committed one or more particular acts which constituted evasion, such as concealing the existence and location of assets, placing assets beyond service of process, or making false statements to agents of the Internal Revenue Service, and (3)

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[26] But see, *e.g.*, *United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir.1969).

that these acts of evasion were part of a course of conduct which had as its purpose the willful evasion of the payment of such taxes.[27] The Court further expects the jury to return, in addition to its verdict on the felony count, answers to specific questions regarding these elements of the offense.[28]

For the reasons stated, the motion to dismiss Count I of the indictment is hereby denied.

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[27] Although the existence of a course of conduct is not an element of the offense as such, it would be unfair to the defendant and inconsistent with the prosecution's theory to permit it to rely on the existence of such a course to defeat the duplicity claim (as augmented by the statute of limitations defense), but then to have this factor ignored when the jury is called upon to make its decision.

[28] The parties will, of course, be given full opportunity to submit appropriate instructions and questions.

APPENDIX D

NO. 85-6211
CR NO. 84-00421-01

UNITED STATES OF AMERICA
v.

JOHN A. SHORTER, JR.

FILED MAR 5, 1987

BEFORE: **EDWARDS** and **SILBERMAN,** Circuit Judges; **McGOWAN,** Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A FISHER, CLERK
BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6211
CR No. 84-00421-01

UNITED STATES OF AMERICA
v.

JOHN A. SHORTER, JR.

FILED MAR 5 1987

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg, Circuit Judges; McGowan, Senior Circuit Judge

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk